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IN THE

Supreme Court of the United States

OCTOBER TERM, 1949.

No. 188

CHARLES L. SURPRISE, TRUSTEE IN BANKRUPTCY,
Petitioner,

vs.

ROBERT B. FLETCHER,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

PETITION FOR WRIT OF CERTIORARI.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1949.

No. .....

IN THE MATTER OF
NORTHERN INDIANA OIL CO., INC., AN INDIANA CORPORATION, ALLEGED BANKRUPT,

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CHARLES L. SURPRISE, TRUSTEE IN BANKRUPTCY,
Petitioner,

vs.

ROBERT B. FLETCHER,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

PETITION FOR WRIT OF CERTIORARI.

Petitioner prays that a writ of certiorari issued to review the judgment of the United States Court of Appeals for the Seventh Circuit entered in the above case on February 6, ~~1940~~ 1950 and amended on the 12th day of April, ~~1940~~ 1950.

OPINIONS BELOW.

The opinion of the District Court, Record, page 537 to 548, is unreported. The opinion of the Circuit Court of Appeals, Record 604 to Record 619 is reported in No. 180, Federal Second No. 669.

JURISDICTION.

The judgment of the Court of Appeals was entered on the 6th day of February, 1950, Record Page 604. A petition for hearing was filed on February 21, 1950, and said judgment was thereupon amended and the petition for rehearing denied on the 12th day of April, 1950, R. 619. The jurisdiction of this Court is invoked under 28 U. S. C. A., Section 1254(1).

QUESTIONS PRESENTED.

(1) (a) Does the failure of the Trustee to *formally* assume "within sixty (60) days after adjudication, as provided in Section 70b of the Bankruptcy Act, 11 U. S. C. A., Section 110(b) *operate to divest a District Court,* sitting in bankruptcy, of Summary Jurisdiction, by virtue of the doctrine advocated in *Palmer* v. *Palmer, et al.,* 104 Fed. 2nd, 161-163:

> Where the bankrupt corporation within four (4) months of bankruptcy, and in violation of the Bulk Sales Law of the State of Indiana,[1] conveyed by lease to a friend of the dominant stockholder and president of the corporation *all of* the tangible assets and *going business* of the corporation, including valuable leaseholds, for an inadequate consideration, for a mere

1. (a) Non compliance with the Indiana Bulk Sales law renders such transferee and assignee upon the application of any of the creditors of the seller, transferor or assignor *a Receiver* and be *held accountable* to *such creditors* for all the goods, wares, merchandise and fixtures that have come into his possession by virtue of such *transfer* or *assignment;* (b) and such transfer or assignment shall be *void as to the creditors* of such assignor or transferor. See Appendix A, sec. 33-201, sec. 33-203 of Bulk Sale law (*infra*).

$100.00 a month, at a time when the corporation had outstanding liabilities in excess of $28,000.00, and,

Where the execution of said lease to said lessee precipitated bankruptcy and the lease itself was not scheduled by the bankrupt corporation; when thereafter the tenant continued to pay the stipulated rental for almost two (2) years after bankruptcy to the Trustee and also continued to pay rentals on the underlying leaseholds as provided for in said lease but where, after the termination of the lease, the tenant without surrendering the property, *refused* to pay further rent, and declared the business, including the underlying leaseholds, to be his own free of the claims of the creditors, and defends on the ground that because the Trustee failed to "petition" the court, or formally "assume" such lease it was "deemed to have been rejected" under Sec. 70b of the Act notwithstanding the fact that the rent was paid during the entire term of the lease?

(b) Where in the above the *court ordered the Trustee* to file a petition for a turn-over order and a rule to show cause is entered and a hearing had on the petition which the tenant resisted and the *court found that by the inactivity* of the Trustee the tenant's lease *had not been rejected*—therefore, the court had constructive possession of the property contained in the lease.

Did the proviso in Section 70b of the bankruptcy act providing "the court may for cause shown extend or reduce the period of time" give the District Court Summary Jurisdiction over the property involved in the lease?

(2) What is the status of the title to a bankrupt's leasehold during the period after the qualification of the trustee and his assumption or rejection of the lease?

Does the title, as the Court of Appeals has interpreted the doctrine in *Palmer* v. *Palmer, supra, never pass to the trustee* except on adoption? or

Does the title, or inchoate interest in the title pass to the trustee and rejection operate on it as a disclaimer of the asset *if it is onerous* or *burdensome* as held by this Court through Judge Cardozo in *Brown* v. *O'Keefe,* 300 U. S. 598, 81 Law Ed. 827?

(3) Where the Creditors of a bankrupt corporation for over two (2) years pressed the Trustee through petitions and demands to seize and recover unscheduled assets of the bankrupt estate, and

Where the bankrupt corporation *within four* (4) *months* of bankruptcy, and in violation of the Bulk Sales Law of the State of Indiana,[1] conveyed by lease to a friend of the dominant stockholder and president of the corporation *all of* the tangible assets and *going business* of the corporation, including valuable leaseholds, for an *inadequate consideration,* for a mere $100.00 a month, at a time when the corporation had outstanding liabilities in excess of $28,000.00, and,

Where the execution of said lease to said *lessee precipitated bankruptcy* and the lease itself was *not scheduled* by the bankrupt corporation; when thereafter the tenant continued to pay the stipulated rental for almost two (2) years after bankruptcy to the Trustee and also continued to pay rentals on the underlying leaseholds as provided for in said lease but where, after the termination of the lease, the *tenant without surrendering the property, refused* to pay further rent, and declared the business, including the underlying leaseholds, to be his own free of the claims of the creditors, and

Where the Trustee did nothing except *to receive rents as* above stated and the Judge of the District Court, after assuming jurisdiction over the case to determine the controversy between the creditors and the trustee, found that

1. See footnote 1, *infra,* p. 2.

the tenant was a fraudulent transferee by virtue of the above transaction and that during and after the expiration of the term of his lease, the tenant became *a "constructive Trustee" for Trustee in bankruptcy* of the property, including the underlying leaseholds and going business and all of the property he received by virtue of his lease and for an accounting since the date of the term of the lease, *and the court ordered the trustee to file a petition for a turnover* order and a rule to show cause is entered and the hearing had on a petition for a turnover order which the tenant and constructive trustee resisted.

(a) Did not the District Court have Summary Jurisdiction over this constructive trustee in view of Clause 8 of Subdivision A of Section 70 of the Act of 11 U. S. C. A. Section 1110(a)(8) F. C. A. title 2 Sec. 110(a)(8), and Sec. 2(a), 21-(11-U. S. C. A., Sec. 11(a)(21) F. C. A. Title 11 Sec. 11, 11(a)(21)?

(b) Did not the District Court have Summary Jurisdiction over this Constructive Trustee to order him by Summary Jurisdiction to surrender the property to the Trustee under rule of *Whitney* v. *Wenmen*, 198 U. S. p. 539?

(4) Where the District Court, sitting in bankruptcy determines issued *raised by creditors petition to seize personal property* and several other pleadings involving property belonging to the bankrupt and in the hands of the tenant of the bankrupt corporation, *together with the petition to direct turn-over property* to Trustee held by the tenant and the court, after hearing evidence on issues raised by said petitions, makes written findings of fact and conclusions of law thereon, among which the District Court found

(A) That the tenant and respondent in the turnover petition was a *fraudulent transferee*;

(B) That he was the lessee of the entire going business together with all its assets of personal property, including leaseholds, trucks and equipment, and

that said lease by which he became lessee was executed within four (4) months of the filing of the petition of bankruptcy.

(C) That it was in violation of the Bulk Sales Law of the State of Indiana.[1]

(D) That the lease precipitated and was the cause of the bankruptcy on the part of the corporation.

(E) And that the lessee took over the business of the corporation for an inadequate consideration.

(F) And that the lease *itself was not an executory* contract; that only one provision of it was executory and which the court had determined the Trustee had rejected (Being in the nature of an option to purchase contained in the lease).

(G) That the bankrupt's business, at the time of bankruptcy, was worth at least $20,000.00.

(H) And that the Trustee, by his inaction by not "formally assuming the lease", *did not reject the respondent's lease*;

(J) And that the respondent continued to pay rent *under the terms of the lease.*

Assuming that evidence in the record sufficiently abounds to support the above findings.

In view of the above and foregoing findings of fact as found by the District Court, was the Circuit Court of Appeals authorized, under Rule 52 of the Civil Rules of Procedure, find a new and *contrary* set of facts from the record of this case as follows:

1. "That no contention is or has been made that this lease was fraudulent."

2. That property with which the bankrupt corporation was seized at *the time of bankruptcy was worthless* as a "dead horse".

3. "That is was undisputed that the Trustee refused to assume the lease."

4. That the rental of $100.00 per month which the respondent tenant continued to pay to Trustee under the terms of the lease after the sixty (60) days, was

1. See footnote 1, *infra*, p. 2.

merely for the use of some odds and ends of personal property and equipment and was not paid under the terms of the lease.

(5) Did the Circuit Court of Appeals undertake in its opinion to deny Summary Jurisdiction and at the same time render an opinion on the merits, by invoking Section 70b of the bankruptcy act to divest the Trustee of the entire assets of his estate?

(6) Where the dominant stockholder and president of a corporation controlling all but a few qualifying shares of stock so that the corporation was little more than his "corporate pocket" and as the president of a corporation he controlled the entire assets of the corporation consisting of the going business and all personal property of every kind, including valuable leaseholds and equipment for conducting an oil distributing business, and the corporation went bankrupt because he conveyed these assets consisting of the entire business to his friend for a mere nominal and inadequate sum within four (4) months of the filing of a petition of bankruptcy and in violation of the Bulk Sales Law of the State of Indiana[1] when at the time the corporation owed $28,000.00 and the District Court found that this transaction was fraudulent and that his friend, the transferee, held such property as constructive trustee for the Trustee in bankruptcy and when at the time of leasing the president stated, "We are going to lease it to Mr. Fletcher. We are going to conserve the assets of this corporation."

Did not the District Court have Summary Jurisdiction over the assets so conveyed by virtue of

(1) *Sampsell* v. *Imperial Paper Company,* 213 U. S. 215, 61 S. Ct. 904?

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1. See footnote 1, *infra,* p. 2.

2. Did the District Court sitting in Bankruptcy have summary jurisdiction over the tenant and respondent by virtue of the Bulk Sales Law of the State of Indiana which makes a violator of the Act a receiver for the benefit of the creditors?

STATUTE INVOLVED.

The pertinent statutory provisions are printed in Appendix A, *infra*, pages 45-50.

SUMMARY OF MATTERS INVOLVED.

Nature of the Case.

The District Court of the Northern District of Indiana, Hammond Division, sitting in Bankruptcy, granted a turnover order on petition of the Trustee, Charles L. Surprise, against the respondent Robert B. Fletcher, a tenant and lessee of the bankrupt corporation.

The Court acted in summary jurisdiction but rendered its judgment with written findings of fact and conclusions of law.

The respondent Robert B. Fletcher appealed to the 7th Circuit Court of Appeals which court reversed the Judgment of the District Court on February 12 1950 Tr. 604 but thereafter on petition for rehearing, the court amended its former judgment on the 15th day of April, 1950 at the same time denying the Trustee's petition for a rehearing. Tr. 619.

The opinion below as amended reversed the District Court's opinion purportedly for the reason that the District Court lacked summary jurisdiction in the matter; holding that the respondent Fletcher's claim to the bankrupt corporation was adverse and more than colorable by reason of the *operation of Sec. 70 (b) 11 U. S. C. A. 110b as amended in 1938* and *by reason of the inactivity of the Trustee during the 60 day period* after adjudication in regard to the respondent's lease.

The Facts.

Because the opinion of the District Court Tr. 537-548 being in the nature of findings of facts and conclusions of law shortly and concisely states the matter involved, we

refer this honorable court to said findings of facts and conclusions of law in the record and necessary supplemental facts of record will be set out as shortly and concisely as possible.

The findings of facts and the conclusions of law of the District Court was the culmination of practically three years of litigation on issues which were first presented to two referees in Bankruptcy and pressed forward by *several creditors of the bankrupt corporation,* including one Arthur B. Harris and his wife (now deceased) Cecelia Harris and which litigation commenced upon the 1st day of November, 1945. Tr. 11.

It must be here noted that during the entire period of litigation up to the date of the filing of the Turnover Petition in this matter that the Trustee in Bankruptcy, Charles L. Surprise and the Appellant in this cause and his attorney who represented him generally resisted every effort, until ordered to collaborate with the creditors who were endeavoring to force the trustee to seize the *unscheduled assets* in the hands of the respondent. The facts concerning the strenuous efforts of these creditors will be shortly stated.

At the outset the bankrupt's business was formed in December of 1936 and consisted of a joint adventure between J. Ralph Snyder, Gary publisher and subsequent president of the bankrupt corporation and one Arthur B. Harris, Tr. 222 creditor and subsequent stockholder of one share of corporate stock. Tr. 223. The business at the outset consisted of retailing fuel oil. It started on a *small scale* with the purchase of *one used truck* and the use of a bulk plant. It was enlarged beginning in May of 1937 to include the sale of gasoline under a franchise which was exclusive, covering Gary and vicinity. In the summer of 1937 the business was incorporated with Mr. J. Ralph Snyder holding 98 out of 100 shares of stock of said corporation. Tr. 222-223.

By the year of 1937 the corporation had acquired as subsequent lessees from the Ohio Oil Company two outlet filling stations indicated and described in the foregoing lease option set out and incorporated in the District Court findings of fact and conclusions of law.

To use a "homely" expression, this lease option entered into on the 15th day of January, 1945 and set out in the court's findings of fact, which during the litigation became "Exhibit A" to the turnover petition, was and is the "nub" of the entire controversy presented in this appeal. Tr. 586.

The two outlet stations which were acquired in the summer of 1937 as aforesaid are identified in said lease as gas station No. 1 and gas station No. 2. In the year of 1939 the said corporate business was again enlarged to include the leasing of a large number of lots from the Gary Land Company and the improvement in the operation of said lots as public parking places.

The corporation constructed a filling station by receiving a $5,000.00 gift from the Ohio Oil Co. of whose product it was the Gary distributor and the filling station so constructed amounted to an investment of $45,077.37 in excess of the $5,000 gift from the Ohio Oil Company, the title to which was taken in the name of the President, Snyder's son, and was almost entirely financed by a mortgage and a lease arrangement between the Ohio Oil Co. and the Calumet Securities Corp., a lending agency in Gary. The corporation held a sublease on this property for a period of fifteen years from the date of 1940. Tr. 180-185.

The evidence tendered by the pleadings upon which the court based his turnover order also disclosed that there was a dispute between the said Arthur B. Harris, the one-time Vice-President and manager and stockholder, and J. Ralph Snyder, President of the bankrupt corporation. This dis-

pute centered around Harris' claim to be the equitable owner of forty-nine shares of the bankrupt corporation's stock according to an alleged joint adventure arrangement between Harris and the publisher Snyder, wherein Harris was to create the business, manage it and Snyder furnish the necessary funds and credit for the business and to hold half of the stock of the corporation as security for monies advanced by Snyder until the debts were all paid. Tr. 226-227.

There was also a dispute in regard to the ownership of various parcels of real estate described in the lease option as parking lots, including the foregoing parcel of real estate known as filling station outlet No. 6 which was built as above described. Tr. 420. This dispute between the President of the bankrupt corporation and the manager and former vice-president of the corporation, claimant to a half-ownership of the stock of the corporation, is indicated in the court's finding No. 25 on page 547 of the transcript wherein the District Court stated, "The general picture here involves a corporation financially embarrassed, legally restrained from engaging in part of its business, *and its Board of Directors at odds leasing* its entire busienss for an inadequate consideration and becoming subsequently bankrupt." Tr. 547. All the parcels of real estate which the corporation was active in purchasing similar to the above described filling station No. 6 as above set forth were either held by Snyder or members of his immediate family.

Neither the lease option (the Fletcher lease) nor the various parcels of real estate which were purchased during the activity of the bankrupt corporation and which were placed in the names of the immediate Snyder family *appear as assets of the corporation as scheduled by J. Ralph Snyder, President of the bankrupt.* Finding 7, Tr. 538, Tr. 408-409.

The bankrupt corporation continued to do business on its parking lots and under the franchise from the Ohio Oil Company selling its products of petroleum, gasoline and oils and associated sundry products, together with the operation of its parking lots up thru 1944 when in the latter part of which year there was an alleged shortage of its gasoline ration coupons by those various outlets in the sale of its retail gasoline.

The Office of Price Administration controlling gasoline ration coupons shut off and denied any and all rights and privileges of the corporation to purchase gasoline wholesale due to the fact that the bankrupt corporation by the operators of its outlets had failed to obtain ration coupons from its retail customers and was facing a shortage of such coupons under the rules and regulations of the O. P. A. The office of O. P. A. effective as of January 15, 1945, shut off the bankrupt corporation's credit to obtain gasoline. Tr. 126. At the time the bankrupt corporation was faced with this suspension order issued by the said Price Administration prohibiting it from directly or indirectly rereivng gasoline for retail or dealing in any manner with the commodity the bankrupt was operating at least six parking lots, five gasoline stations and a bulk storage plant, together with the Oasis, a trailer camp and restaurant. Tr. 126.

It was at this juncture of the corporation's business that J. Ralph Snyder undertook to rid himself of the stockholder and ownership claimant, who claimed to own forty-nine shares of the corporate stock and also claimed that the various parcels of real estate which then stood in the name of Snyder, his business associations, the Gary Publishing Company or members of his immediate family belonged rightfully to the corporation. J. Ralph Snyder at this point took steps to throw Mr. Harris, his putative partner, associate, business manager of the corporate

business, out of the business entirely by conveying to the said Robert B. Fletcher (who incidentally had never before in his life been engaged in the business of oil distributing or operating filling stations) the entire business of the bankrupt corporation, "lock, stock, and barrel", together with all of its equipment and good will and list of customers for the mere nominal sum of allegedly $50.00 per month.

This plan was consummated physically on the morning of January 15, 1945 when Mr. Snyder and Mr. Fletcher appeared in the main office of the bankrupt corporation with two police officers without any writ or legal authority and escorted Mr. Harris off the premises out into the street.

This supplanting of Harris who was actually the builder of the corporate business by Robert B. Fletcher and the execution of the lease option which is the bone of controversy in this turnover order was one simultaneous transaction. According to the statement of the bankrupt's president which appears in the transcript on page 228 the purpose of leasing the entire assets of this going concern to the Respondent, Fletcher, was as he said "We are going to lease it to Mr. Fletcher. We are going to conserve the assets of this corporation." Tr. 228. At this time the corporation had liabilities to creditors in the amount of $28,000. The consideration for the lease to Fletcher was *nominal* and *insufficient* as pointed out in the District Court's finding of facts, the mere nominal sum of $50.00 per month which allegedly was a typographical error and was meant to be $100.00 per month. Findings 25, Tr. 546.

Neither the corporation nor Fletcher complied with the provision of the Bulk Sales law of Indiana. Finding 6, Tr. 538.

The involuntary petition in bankruptcy was filed against this bankrupt on the 26th day of April, 1945. The corpora-

tion was duly adjudged bankrupt on May 14, 1945 and Charles L. Surprise was appointed as Receiver on June 15, 1945. Thereafter the Trustee on October 10, 1945 filed a petition with the Referee asking permission to sell Fletcher the items of personal property covered in the lease under the terms of the option contained in said lease and the then Referee granted the petition. The then Referee was one Alfred P. Draper who on the date of the filing of the petition herein and for a long time prior thereto was the personal attorney for J. Ralph Snyder, President of the bankrupt concern. He also was the attorney for the son of J. Ralph Snyder, Jack T. Snyder and H. B. Snyder, his brother and also the attorney for the Gary Printing and Publishing Company a Snyder corporation. On the 10th day of October, 1945, the said Referee, Alfred P. Draper called a hearing in his office on the petition of Charles L. Surprise, Trustee which petition prayed for the authority to sell Fletcher the personal property mentioned in the lease option for the sum of $4000.00.

This petition resulted in a hearing before A. P. Draper, referee who filed a summary of evidence which appears as a fact in the record Tr. 27-29 to show the relationship and attitude of the parties herein. Tr. 29.

The Respondent Fletcher, the tenant herein, actively applied the summary jurisdiction of the court at this point by asking to exercise the option in the lease and further resisting the petition to review filed by the objecting creditors. Respondent appeared in person before the Referee Alfred P. Draper on the Referee's hearing of the first petition and dealt directly with the court's referee by bidding in open court for the part of the property involved. Tr. 12. Thereby Respondent was successful in procuring an order from Referee Draper directing the Trustee to sell him this part of the bankrupt's leased property by summary procedure. Top Tr. 15. The order dated November

1, 1945, Tr. 11, Referee Draper's certificate on review of that order contains a recital that "after hearing * * * Fred F. Eichhorn on behalf of respondent Robert B. Fletcher in support of said petition * * * the order complained of (granting the petition to sell to Fletcher) was duly entered. Tr. 30.

Subsequently the same Referee, Draper, filed his Certificate of disqualification contending "I am retained and representing J. Ralph Snyder * * * etc." Tr. 27. Snyder was the bankrupt's president who the District Court found had caused the bankrupt to make the improvident lease of its assets and business to the Respondent Fletcher, which precipitated its bankruptcy Tr. 546 to 386. Snyder the president of the bankrupt corporation, for reasons not otherwise explained in the record was present in person at the hearing before the Referee Draper and in support of Fletcher on the petition to sell to Fletcher. Tr. 12-30.

It was at this point in the proceedings that Charles L. Surprise, Trustee in this cause and a professional Trustee in the Northern District of Indiana began to resist all efforts on the part of the petitioning and objecting creditors Arthur B. Harris and his wife, Cecilia H. Harris and several other creditors to bring in these unscheduled assets and the said Trustee and his attorney resisted these creditors who were attempting to block the sale of the personal property under the option arrangement of this fraudulent lease executed by the President of this bankrupt concern, by appearing in the District Court and resisting the petition for a review filed by said Harris and Harris to the order of the Referee Draper.

This resistance on the part of the Trustee against every effort of the creditors demands and petitions on the part of said creditors and stockholders continued until *the very eve of the filing of the present petition* for a turnover in this cause. Tr. 245-252.

The said Trustee and his attorney resisted every and all efforts on the part of the petitioner creditors of the stockholder to bring in all the unscheduled assets including the going business of the bankrupt corporation until after *an extensive hearing* of which the Respondent Fletcher had actual notice before the Judge of the District Court and which hearing before the said Judge culminated and resulted in the change of attitude on the part of the Trustee in Bankruptcy herein, the removal or resignation of his attorney, and the employment of the creditors' attorney, Mr. George Cohan, Esq., and the immediate filing of a petition for turnover. Tr. 252. Thus the instant petition for a turnover or rule to show cause came about after extensive hearings beginning on January 22, 1948, before the judge of the District Court and involved the following pleadings and issues tendered:

1. Trustee's verified petition for authority and direction to sell personal property filed August 23, 1946, Tr. 327;

2. Written objections to proposed sale of trustee filed by creditors and stockholder Harris and Harris, Tr. 359;

3. Additional objections to trustee petition to sell personal property, Tr. 362;

4. Trustee's reply to additional objections to Trustee's petition to sell personal property, Tr. 372 (Objectors' Exhibit 3);

5. Petition for order on Trustee to seize all personal property belonging to the bankrupt estate and for an accounting, Tr. 38 (Objectors' Exhibit 4);

6. Objections of Robert B. Fletcher to the jurisdiction of the court, Tr. 387;

7. Petition to direct turnover property to trustee filed January 29, 1948, Tr. 88.

Based on the evidence heard in the above and foregoing issues the Judge of the District Court made his findings of

facts and conclusion of law above set forth, and under the circumstances held that the District Court sitting in bankruptcy had Summary Jurisdiction over the appellee respondent herein.

After hearing this evidence the Judge of the District Court was of the Opinion that the Trustee in Bankruptcy herein was not fulfilling his obligations to the estate in resisting of the petition of the creditors and stockholders who sought to recover the assets of this estate, and ordered the said Trustee and his attorney to change their attitude in regard thereto. The order of the court in this respect is shown by the transcript beginning on page 250 at the bottom of the page:

> "The Court: Let me make this observation: The Court has an arm here in Mr. Call and Mr. Surprise and I have asked them to go after these assets, or at least give me their views as to how to get them. I want to give them time to do it, but I am not going to let this thing go along indefinitely. I will hear you as soon as they have had time to reflect on what is the best way to go after them. I am going to hear Mr. Call's viewpoint on that, and I expect Mr. Call— I don't want to reiterate it; I am not taking the position that you may not have had the same attitude before, I am not saying that, *but I am saying that I expect the Trustee and his counsel to attempt to find out how there can be now gotten these assets that are not in this picture,* as far as tangible assets are concerned. I feel there is enough here to warrant the viewpoint that there ought to be a thorough investigation and an opinion expressed as to how that can be accomplished. With this showing I don't feel as though the Court should sit by and perhaps see *the spirit and the latitude of the Bankruptcy Act subverted by having* a man come in and build a business on a lease that has now expired.
>
> That is all I have to say today. I am going to set this matter over until next week.
>
> Mr. Cohan: What time, your Honor?

The Court: Do you have any commitments the early part of next week?

Mr. Call: I wouldn't know, but whatever it is, I will get rid of it some way or another in order to finish this up.

The Court: I have a jury working next week, but I was wondering about some time early in the morning, say about Wednesday. Is that agreeable to you, Wednesday morning, about nine o'clock?

Mr. Call: Yes; next Wednesday.

(And thereupon said hearing was continued to Wednesday morning, January 28, 1948, at nine o'clock.)''

On January 28, 1948 the Trustee herein acting under the direct orders of the judge of the District Court filed a petition for a turnover prepared by his new attorney, Mr. George Cohan who had heretofore been the attorney for the Creditors, Harris and Harris. Tr. 533.

The hearing beginning on January 22 and which ended on the 28th day of January was all made a part of the hearing on the turnover petition filed by the Petitioner and by pre-trial conference between the Respondent Fletcher and his attorney, Mr. Fred Eichhorn of the firm of Draper and Eichhorn. Tr. 256.

The entire proceedings was reduced to transcript form by the Court Reporter and introduced into the hearing on the present turnover petition as part of the evidence according to the pre-trial conference which took place on Friday November 5, 1948 being Petitioner's Trustee's Exhibits one and two. Tr. 257.

The District Court after hearing the complete evidence tendered under the issues above described found that the Respondent was not only a fraudulent transferee with notice but the acknowledged tenant of the bankrupt corporation and thus of the Trustee, and proceeded to order the turnover order finding that the respondent was a tenant (even though a fraudulent transferee) holding over and

refusing to surrender the res of his tenancy after term thus proceeding with summary jurisdiction.

Because the question of fraud of the lease having been mooted it having expired December 31, 1946 and the respondent having paid rent up to and including that term, but refused to pay rent subsequent thereto the District Court imposed a constructive trust upon the respondent as of January 1st, 1947 and ordered him to account to the Trustee as of that date. Finding 25, Tr. 545, 547-548.

The Respondent appealed to the 7th Circuit Court of Appeals which reversed the judgment of the District Court Tr. 604 and the petitioner seeks a review of the decree of the Circuit Court of Appeals holding that the Respondent was not subject to the summary jurisdiction of the District Court sitting as a court in bankruptcy.

SPECIFICATION OF ERRORS TO BE URGED.

The Circuit Court of Appeals erred:

(1) In holding that the District Court lacks summary jurisdiction.

(2) In holding that by the operation of section 70(b) of the bankruptcy act where the Trustee remained inactive but accepted rents from his constructive trustee and tenant for the period of sixty days after adjudication and for two years thereafter that the Trustee had automatically rejected the lease of the tenant.

(3) In holding that the bankruptcy court was powerless for cause shown to extend or reduce the 60 day period in section 70(b) where the Trustee had remained inactive but had accepted rents from his tenant and constructive trustee during the 60 days and for a period of two years thereafter.

(4) By interpreting section 70(b) in such a manner so as to divest the estate (bankrupt) of its entire assets by virtue of the passive inactivity on the part of the Trustee who accepted rents therefor from the hands of a tenant and constructive trustee.

(5) By holding that a Trustee in bankruptcy upon adjudication is *never seized* with the bankrupt's leaseholds unless he assumes same according to the doctrine of *Palmer* v. *Palmer*, 104 Fed 2nd 101-163.

(6) By holding that a tenant of the bankrupt who holds the entire assets of the bankrupt estate by virtue of a lease obtained within four months of bankruptcy and in violation of the Bulk Sales Law of the State of Indiana by reason of which *violation the Indiana statute* makes

him *a "receiver"* is not subject to summary jurisdiction of the bankruptcy court.

(7) By rewriting a new set of findings of facts different and contrary to those of the District Court and basing its conclusion of law thereon.

(8) By rendering an opinion wherein the court denied jurisdiction and at the same time rendered an opinion on the merits.

(9) In assuming jurisdiction of the person and subject matter of the underlying lessors.

(10) By reversing the judgment of the District Court.

REASONS RELIED ON FOR ALLOWANCE OF WRIT.

The Petitioner believes that a writ of Certiorari should be granted herein in this cause because:

A. The Circuit Court of Appeals has decided a federal question of substance and of great importance to the administration of the bankruptcy act being section 70(b) 11 U. S. C. A. 110b as amended in 1938 and which has not as yet been precisely passed upon and settled by this Honorable court, but there is direct conflict which arises because of the application of section 70(b) in conjunction with *Palmer* v. *Palmer,* 104 Fed. 2nd 161-163, and the doctrine therein promulgated in *Brown* v. *O'Keefe,* 300 U. S. 598, 81 L. ed 827, a decision of this court on the question as to when the title of a bankrupt's leasehold passes.

(1) The questions of law involved are of great importance to the business world, particularly the gasoline and oil wholesalers and distributors whose investment and structure *is based on leasehold estates* and hauling contracts such as are involved in this case; to these great investors in the nation's commercial world the question of creditors engaged in this ever-expanding business will be one of askance for the safety of their invested capital.

The opinion of the Circuit Court of Appeals by the *too rigid and unintended application* and interpretation of Section 70(b) of the Bankruptcy Act places this entire structure, representing as it does the many millions of dollars invested, at the mercy of any careless or sluggish Trustee, who by his *mere inactivity* would be able to sweep all of the assets of a valuable business into the hands of a fraudulent transferee. This could happen through a

conveyance such as we have here: (1) a lease option arrangement executed in violation of the Bulk Sales Law of the State of Indiana, and (2) further executed in the face of section 67d2 of the bankruptcy act, 11 U. S. C. A. 107d2.

The uncontradicted testimony in this case and the opinion of the District Court further indicates that a lease option arrangement was executed between the bankrupt corporation by and through its president, Ralph Snyder with the respondent appellee, Robert B. Fletcher, herein conveying the entire bulk of the said business within the prohibited time *i. e.* four months before bankruptcy and in violation of section 67d3 of the Bankruptcy Act and *also* that this so-called lease option was fraudulent by virtue of its violation of the Bulk Sales Law of the State of Indiana,[1] that the said lease option between the Respondent Appellee, Robert B. Fletcher, was *never scheduled* in the Schedule of Assets and was the sole cause of bankruptcy, constitutes an act of bankruptcy executed by the President of the bankrupt corporation and that in the opinion of the District Court the execution of said lease option to the fraudulent transferee *precipitated the corporation into bankruptcy and that said transfer was made without a fair consideration and resulted in the bankrupt's insolvency in violation of the bankruptcy act.* This astounding and repugnant result is achieved by the holding that the Trustee's reliance upon this so-called "lease option", wherein Robert B. Fletcher, respondent appellee, continued to pay rentals to the underlying Lessors herein

1. (a) Non compliance with the Indiana Bulk Sales law renders such transferee and assignee upon the application of any of the creditors of the seller, transferor or assignor *a Receiver* and be *held accountable* to *such creditors* for all the goods, wares, merchandise and fixtures that have come into his possession by virtue of such *transfer* or *assignment;* (b) and such transfer or assignment shall be *void as to the creditors* of such assignor or transferor. See Appendix A, sec. 33-201, sec. 33-203 of Bulk Sale law (*infra*).

and the acceptance of the stipulated monthly rentals by the underlying lessors *did not amount* to an *affirmance of said executory underlying leases* but a forfeiture thereof.

The decision of the Court of Appeals holding that (1) a lease to a tenant conveying the *entire* business of a bankrupt executed *within four months* of the filing of the petition of bankruptcy and executed in violation of the Bulk Sales Law of the State of Indiana,[1] for an *inadequate* consideration of a mere One Hundred Dollars per month at a time when there were outstanding liabilities approximating $28,000, so that the conveyance and lease *precipitated* bankruptcy, and embraced the entire going business of the bankrupt *although it was never scheduled as an asset of the bankrupt corporation* and that said business consisted of valuable leaseholds together with other personal property made up the whole of the going business of the bankrupt.

(2) Where the tenant continued to pay the stipulated rental for almost two years after bankruptcy to the Trustee and continued to pay the rent on the underlying leaseholds which he was the sub-tenant *as provided for in the lease*

(3) and except for an option to purchase the business provided for in the lease which was ruled out by the District Court, *the lease was wholly executed by the bankrupt,* and the Trustee except for the *passive* right to receive rent from the tenant

(4) and where after the term of the lease the tenant refused to pay further rent,

(5) declared the business to be his own free of claims of creditors,

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1. See footnote 1, *infra,* p. 24.

(6) the opinion holding further that because the Trustee failed within sixty days after adjudication to either affirm or reject the said lease as provided for by section 70(b) that said lease was *deemed to have been rejected and that the Trustee never was seized with the lease nor the underlying leaseholds* by virtue of the operation of section 70(b), 11 U. S. C. A., 110b, and that therefore the tenant or lessee could *WITHOUT surrendering his estate* negotiate and hold as his own *as against the Trustee* and *the District Court* which at the request of the creditors and by virtue of the provisions of section 70(b) of the act which states "provided, however, that the court may for cause shown extend or reduce such period of time" *ordered the Trustee to recapture the business of the bankrupt from such lessee and tenant by filing a petition for a turnover order.*

(7) The Circuit Court of Appeals further holding that not only could the tenant under the doctrine of *Palmer* v. *Palmer,* 104 Fed. 2nd 161-163, defy the Trustee and the District Court *because no interest or title which the bankrupt held ever passed to the Trustee upon the filing of the petition of bankruptcy* but because of the doctrine of *Palmer* v. *Palmer, supra,* not even *constructive possession* was ever in the Trustee and for that reason the District Court was without summary jurisdiction to recapture these assets.

This question involving the 7th Circuit Court of Appeals' application of section 70(b) of the Bankruptcy Act is of great importance to the members of the legal profession throughout the country for it is through their hands that both the creditors and the debtors seek protection from the pitfalls of commercial risks and the danger of fraudulent transfers. The profession calls for an elucidating and authoritative decision of this court to clarify this situation as to the effect of section 70(b) of the bankruptcy

act under circumstances as exist here in the presence of an obvious fraudulent conveyance to a "constructive Trustee". This Court should settle once and for all the apparent disputation of the 7th Circuit Court of Appeals with the opinion of the distinguished Court of 1937 headed by the late Charles Evans Hughes, wherein Judge Cardozo delivered the unanimous opinion in *Brown* v. *O'Keefe,* 300 U. S. 598, 81 L. Ed. 827, stating unequivocally that the Trustee *is* seized with the title of executory contracts of the bankrupt upon the filing of the petition. When looking to Section 70(b) of the Act and bearing in mind the *mischief* which the section *sought to remedy, i.e.,* of lessors seeking indemnification in the nature of damages for breach of an executory contract and seeking to protect the Trustee from burdensome and onerous obligations which might dissipate the assets of an estate, it is illogical that this section of the bankruptcy act should be used as a shield by *fraudulent transferees* seeking to take over the entire business of a bankrupt by virtue of the passive attitude of a Trustee as in this case.

If the statement of Judge Cardozo in *Brown* v. *O'Keefe, supra* is *to be held to by this court* then of course *neither the Trustee* or *any officer* of the court *could divest or abandon an asset* of the estate unless *it be deemed burdensome* and then an order of the court would be necessary to accomplish that end. *Whitney* v. *Wenman,* 198 U. S. 539; *Hebert* v. *Crawford,* 220 U. S. 208. The apparent conflict between Judge Learned Hand in *Palmer* v. *Palmer, supra,* of the 2nd Circuit and Judge Cardozo in *Brown* v. *O'Keefe, supra,* should be finally resolved by this court and we think in favor of the former decision of this court.

B. The Circuit Court of Appeals has rendered a decision and has decided a federal question involving the administration of the bankruptcy act in a way probably in conflict with applicable decisions of this court and contrary

to clause 8 of Subdivision (a) of section 70 of the act, 11 U. S. C. A. Sec. 110(c)(8) F. C. A. title 11, sec. 110(a)(8) *which provides for the vesting in the Trustee* of title to property *held by an assignee for the benefit of creditors* appointed under an assignment which constituted an act of bankruptcy. It further declares that such property shall be deemed to be held by the assignee as the agent of the bankrupt and *shall be subject to the summary jurisdiction of the court.* The jurisdictional provision was added by the amendatory act of 1938. It is for the most part declaratory of prior rules established by court decisions. *Its primary purpose is to substitute a summary proceedings for the plenary suit theretofore required* to obtain an accounting by a non-bankruptcy receiver or *Trustee* for disbursements made prior to the bankruptcy. *Emil* v. *Hanley,* 318 U. S. 515; *Sampsell* v. *Imperial Paper Co.,* 313 U. S. 215, 61 S. Ct. 904. The provision of the bankruptcy act giving the bankruptcy court power to require the *receiver* or *trustee* of the bankrupt property to deliver property under their control to the bankruptcy trustee and to account to the bankruptcy by substituting a summary proceeding was designed to eliminate delay and cost of a plenary suit formerly required to obtain an accounting for disbursements and to provide more effective control of such disbursements. *Emil* v. *Hanley, supra.*

It is impossible to consider the issues involved herein without recognizing that the *prime mover* and *outstanding factor* in this entire controversy is J. Ralph Snyder, the president of the bankrupt. Indeed, eliminating the alleged claims of objecting creditors and stockholder Harris, *Snyder held* except for a few qualifying shares, the entire stock and control of this bankrupt corporation. In fact the interest and control of this dominant stockholder made the bankrupt corporation little more than his *corporate pocket* so that when Snyder as President of the

corporation which he alone *controlled* at the time, conveyed the entire assets of the bankrupt corporation over to the Respondent Fletcher within three months of bankruptcy and without compliance with the Bulk Sales Law of the State of Indiana by either Snyder or Fletcher.[1] The transaction was fraudulent and one prohibited by the purpose of the bankruptcy act itself. These facts which the trial court took under consideration in making its findings of facts and opinions and conclusions of law, and granting the turnover petition herein become obvious in the face of the record by the statement made by Snyder at the time of evicting Harris from the office of the corporation to the effect that "*We are going to lease it to Mr. Fletcher. We are going to conserve the assets of this corporation.*" This was an indication to the District Court that the Respondent Fletcher came into this picture not as a party of *adverse interest* but merely as the tenant agent or trustee of Snyder, the dominant stockholder of the corporation, *to conserve the assets of the corporation* (among other things) in the face of the desist order from the Office of Price Administration in Chicago.

The District Court found that Fletcher's claim aside from being a tenant was merely colorable and indeed because of the language used by the dominant stockholder and president of the bankrupt corporation at the time of the execution of this lease to the effect that "we are going to conserve the assets of this corporation" it was logical and justifiable for the District Court to find as it did that the respondent Fletcher was *a constructive Trustee of the assets of the corporation* and that the bankruptcy court had statutory summary jurisdiction under the amendment of 1938 to order the *constructive Trustee* to turn over the entire assets of this estate which he was wrongfully with-

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1. See footnote 1, *infra*, p. 24.

holding after the term of his fraudulent lease because he stood in exactly the same position and in fact probably was an assignee for the benefit of the creditors.

That the District Court had summary jurisdiction to determine that Respondent was such a "constructive Trustee" is now beyond question. *Cline* v. *Kaplan,* 323 U. S. 691, 89 L. ed. 558.

That the amendatory act of 1938 added new power to the jurisdiction of the bankruptcy court is obvious in view of clause 21 of section 2(a) of the Act (11 U. S. C. A. 11 (a)(21), F. C. A. title 11, 11(a)(21)) former decisions limiting the jurisdiction of the bankruptcy court in summary proceedings apparently will be re-examined and reconsidered in the light of provisions of such clause 21 which was added by the Act of 1938. The amendment casts serious doubt upon such decisions as *May* v. *Henderson,* 268 U. S. 111, 69 L. ed. 870; *Louisville Trust Co.* v. *Comingor,* 184 U. S. 18, 46 L. ed. 413; *Bryan* v. *Bernheimer,* 181 U. S. 188, 45 L. ed. 814.

The Respondent Fletcher not having complied with the Bulk Sales Law as the Court found, thus became a receiver under and by virtue of Sec. 33-203, Burns Annotated Statutes being the Bulk Sales Law of the State of Indiana, which provides "any purchaser or transferee or assignee who shall not conform to the provisions of the Act shall upon application of any of the *creditors* of the seller, transferor, or assignor *become a receiver and held accountable to such creditors* for all the goods, wares, merchandise and fixtures that have come into his possession by virtue of such sale, transfer or assignment". Being a receiver by virtue of the Act he thus becomes subject to a summary order of the bankruptcy court under clause 21 of the amendment.

Taylor v. *Sternberg,* 293 U. S. 470, 79 L. ed. 599.

C. The decisions and decree of the Circuit Court of Appeals involves a Federal question arising under the Bankruptcy Act, relating to the rights of creditors which is important to the proper administration of the Bankruptcy Act, in that the decree of the Circuit Court of Appeals of the Seventh Circuit *misapplies* Section 70(b), 11 U. S. C. A. 110b, to divest the District Court of summary jurisdiction of property in *its constructive possession* and in the hands of a *constructive Trustee* and *tenant* of the bankrupt, and the decision of the Circuit Court of Appeals appears to be in conflict with the principles of law established in analogous cases by this honorable court in:

Brown v. *O'Keefe,* 300 U. S. 598.
White v. *Schloerb,* 178 U. S. 542.
Gross v. *Irving Trust,* 289 U. S. 342.
Whitney v. *Wenman,* 198 U. S. 539.
Babbit v. *Dutcher,* 216 U. S. 102.
Isaacs v. *Dobbs,* 282 U. S. 739.
Herbert v. *Crawford,* 228 U. S. 208.
Lucas v. *Book,* 118 Wall. U. S. 436.
Williams v. *Morris,* 95 U. S. 444.

(1) The decision of the Circuit Court of Appeals has decided an important Federal question involving Section 70(b) of the bankruptcy act, which is highly important to the proper administration of the bankruptcy act which decision *protects fraudulent transferees* instead of the *defrauded creditors,* encourages fraudulent transfers in general, violates the letter and spirit of the bankruptcy act itself, weakens *the directive and corrective power* of the Judge of the District Court over its officers in the administration of the act, and is beyond doubt in conflict with applicable decisions of this honorable Court dealing with Fraudulent Transfers in the nature of acts of bankruptcy.

The Circuit Court of Appeals misinterpreted and misused section 70(b) of the bankruptcy act 11 U. S. C. A. 110b

This is the main underlying error in the opinion of the Circuit Court of Appeals and the mainspring of its reversal of the judgment of the District Court whereby with one stroke the Appellate Court:

(2) Divested the District Court of Summary Jurisdiction.

(3) Destroyed the relationship of landlord and tenant between the Trustee lessor and respondent lessee.

(4) Invaded the province of the rights and duties of the underlying leaseholds, the lessors of the bankrupt, without first obtaining jurisdiction over the underlying lessors or having any issues by them presented or tendered.

(5) Disregarded the rule of *Stare Decisis* by ruling contrary to the announced decisions of the U. S. Supreme Court on a vital and important matter affecting the administration of the bankruptcy act. (*Brown* v. *O'Keefe,* 300 U. S. 298.)

(6) Denied the right, power and duty of the Judge of the District Court to supervise, direct, instruct and order the "arm" of his court, the Trustee, to the end that valuable assets of a bankrupt estate be properly marshalled.

(7) Denied the power of the District Court of Judge thereof "*for cause shown* to extend or reduce (the 60 day period) such period of time".

(8) Approved the abandonment of valuable assets which were not burdensome or onerous of a bankrupt estate through the *mere inaction* on the part of the Trustee.

(9) Permitted a fraudulent transferee as the agent and tenant of the President and dominant stockholder of a bankrupt corporation to deny the rule laid down in *Samp-*

sell v. *The Imperial Paper Co.* invoked Section 70(b) of the act and the 60-day deadline clause therein in a case where the valuable asset was neither an "executory contract, burdensome or onerous".

The use and application of Section 70(b) of the act to apply it in the manner in which this opinion does under the facts in this case by holding to the doctrine announced in *Palmer* v. *Palmer, et al., supra,* thus keeping the assets involved in this lease *from ever becoming a part of the estate* which the Trustee was seized with, permits the fraudulent transferee herein, the respondent, to circumvent the well-considered and important decisions of *Whitney* v. *Wenman,* 198 U. S. 539; *Babbitt* v. *Dutcher,* 216 U. S. 102; *White* v. *Schloerb,* 178 U. S. 542.

(10) There is a further apparent conflict in the decision of the Circuit Court of Appeals which arises because of the application of section 70(b) of the act. The facts herein, between the decision in *Pfister* v. *Northern Illinois Finance Corp.,* 63 S. Ct. 133, 317 U. S. 144. The Circuit Court of Appeals in its opinion in effect denies the power and the authority of the court over its Trustee and officer to extend the sixty day limitation period, set out in section 70(b) of the act. Where dealing with a similar limitations provision of 11 U. S. C. A. 67 under section 75 this court held that a conflict of circuits as to whether the ten day period for filing a petition for review of a commissioner's order was a limitation on the part of the reviewing court to act or on the right of the aggrieved party to appeal *impelled this court* to grant certiorari; that section 39, subsection C of 11 U. S. C. A. 67 was not a limitation on the sound discretion of the bankruptcy court to permit the filing of petitions for a review *after* the expiration of the period. That the power of the bankruptcy court to review orders of a referee is unqualifiedly given in section 2(10).

This opinion was delivered by Justice Reed and cited with approval a decision of the 3rd circuit court of appeals. *Thummes* v. *Von Hoffman,* 109 Fed. 2nd 291. The language in regard to the power of the court under the proviso contained in Section 70(b) of the Act is similar wherein it provides that the Court may, for cause shown, extend or reduce such period of time. The above rule is further emphasized when one bears in mind that the bankruptcy court is an equity court and will not be hemmed in by hard and fast rules which act to the detriment of the estate administered and in this case to the destruction of the entire estate.

D. The Circuit Court of Appeals has decided an important question of general or local law relating to the relationship of landlord and tenant in a way probably untenable and in conflict with the weight of decision of this honorable court and other authorities.

A tenant's possession is his landlord's possession. He cannot deny or undermine his landlord's title. His basic duty is to preserve his landlord's property intact and *to surrender it to his landlord at the end of the tenancy.* He is estopped to deny his landlord's title or acquire an adverse interest.

Magnolia Petroleum Co. v. *Carter* (1a 1941), 2 So. 2nd 680, 682, 683.

St. Germain v. *Sears, Roebuck & Co.* (1942), 112 Ind. App. 412, 418.

Williams v. *Morris* (1877), 95 U. S. 444, 24 L. Ed. 360, 361-362.

Continental Trust Co. v. *Tallahassee Falls Mfg. Co.* (D. C. Ala. 1915), 222 Fed. 694, 704.

Lucas v. *Brooks* (1873), 18 Wall. U. S. 436, 21 L. Ed. 779, 782-783.

Appellant-respondent's entire argument on the merits is grounded upon two fallacies:

(1) The opinion of the Circuit Court of Appeals contends by virtue of section 70(b) the Respondent Fletcher's written lease with the bankrupt became automatically rejected after sixty days after adjudication.

(2) That the Trustee, landlord of the Respondent, lost his title to the leased property, or part of it, because the Trustee's supposed technical failure to affirm the bankrupt's underlying leases or contracts (which the bankrupt had sub-leased to Respondent) caused a technical rejection thereof as between the Trustee and the Trustee's landlords. Both these contentions are unsound because:

(a) As the District Court pointed out in its opinion Tr. 544, it makes no difference with this case whether Respondent be considered a tenant under his original written lease or whether that lease be considered "rejected". By his own admission and other uncontradicted evidence he *was some kind of a tenant* under the Trustee paying rent to the Trustee for a year and a half from June 1945 through December 1946. The estoppel to deny the landlord's title, and the tenant's duty to *turn back possession to his landlord* applies to every kind of tenancy such as:

A tenant holding possession under a void lease.

> 51 C. J. S. Landlord and Tenant, Sec. 269, p. 913.
> *Howie* v. *Pleshek* (Wis., 1925), 203 N. W. 910, 911.
> *Warner* v. *Hale,* 65 Ill. 395, 396.

And the rule applies to a tenant at sufferance or one holding over, and to a tenant of personal property as well as real estate. 51 C. J. S., Landlord and Tenant, Sec. 267, p. 91.

(b) Respondent is estopped to raise *any question of alleged* invalidity of his landlord's (Trustee's) ownership

of the underlying leaseholds which were subleased to him. He is also estopped to *acquire or assert* any adverse title against his landlord. The following case, involving a petroleum distributor is quite closely in point and so holds: *Magnolia Petroleum Co.* v. *Carter, supra.*

While the *rights of the underlying lessors* were not before the Circuit Court of Appeals nor before this court the respondent Fletcher is estopped to raise the issue involved in said underlying leases, having never applied to the court to be relieved from their leases the said underlying lessors have waived any right to complain and to the contrary their relationship with the bankrupt corporation through its tenant they have been receiving rent, having been cooperating with the bankrupt's tenant, having never invoked any alleged rights which they have by virtue of assignment clauses *but if they had,* they would be *estopped* for the reason that the lessors of the outlets and others who had contracted with the bankrupt such as Ohio Oil Company, would now be precluded from asserting against the Trustee, that his leaseholds and contracts had become "rejected" by the Trustee's inaction. Nor could they now assert bankruptcy forfeiture clauses in their leases; for the reason is that they failed to make any timely assertion of such privileges but went ahead and accepted rent from the Trustee's tenant or sub-tenant (respondent) who was paying it on his landlord's behalf as part of the consideration for his sub-lease, Tr. 383.

In re: Sound (7 Cir. 1948), 171 F. 2nd 253.

Fin v. *Merghan* (1945), 325 U. S. 300, 301, 65 S. Ct. 1147.

Waukegan Times Theatre Corp. v. *Conrad* (1945), 324 Ill. App. 622, 59 N. E. 2nd 308, 312.

Fletcher the respondent herein being a subtenant of the bankrupt Trustee still in possession under his landlord's

lease is foreclosed by estoppel to challenge his landlord's title. American Jurisprudence, Vol. 32, Sec. 101, page 108, *et seq.* *Rector* v. *Gibbon,* 11 U. S. 276, 28 L. ed. 427. *Robertson* v. *Pickerell,* 109 U. S. 608, 27 L. Ed. 1049.

While there may be exceptions under certain circumstances where a tenant is not estopped to deny his landlord's title, still while he remains in possession and until he surrenders the possession to the landlord, it is well settled that a tenant cannot in an action involving the possession of leased premises controvert the title of his landlord to assert any rights adverse to that title or set up any inconsistent right to challenge the relation existing between himself and his landlord without first delivering up to the landlord the premises acquired by virtue of the agreement between themselves.

American Jurisprudence, Vol. 32, Section 126, page 128. Note 18, and citations cited thereunder.

1. This rule is even more emphatic where the lease by which the sub-tenant takes over from the tenant contains the proviso obligating the sub-tenant TO PAY THE RENTALS on said leaseholds.

Williams v. *Morris,* 95 U. S. 444, 24 L. ed. 360.

2. This rule applies to any person who claims under a tenant as a sub-tenant.

American Jurisprudence, Vol. 32, Section 120, Page 124.

E. The opinion and amended opinion of the Circuit Court of Appeals when fully examined in light of the transcript of record of the issues involved herein constitutes *such a departure from the accepted usual* course of *appellate procedure* as to call for the exercise of this Honorable Court's *supervisory powers,* in that:

(1) The original opinion as rendered by the Circuit

Court of Appeals on the 6th day of February, 1950 contain *admitted* reversible error on its face, in that the court undertook to *deny jurisdiction* and, at the same time, to render an opinion on the *merits.*

The *meager amendment* by the Circuit Court of Appeals to its original opinion does not confine the opinion to one of jurisdiction even though such confining clause *is* tacked on to the bottom of the opinion, because the court's dealing with the merits is not confined to the above quoted statement at the close of the opinion. It runs throughout the opinion, which deals elaborately with the value of the leaseholds and the business in controversy between the Trustee and the respondent. The merit in the respondent's claim to the leasehold in the business and the lack of merit in the Trustee's claim thereto.

In its present patched up condition, this opinion, as it now stands will operate not only to prejudge and prejudice the merits of the Trustee's rights *without jurisdiction,* but it will serve as an erroneous precedent for so doing in other cases in the future to the confusion of Federal jurisprudence. The present amended opinion is *so ambiguous* as to its *import and intendment* so as to require this court in the exercise of its supervisory powers to at least require a rewriting of the opinion even *if it is held* that summary jurisdiction *was* lacking in the District Court, because the opinion ostensibly by its final paragraph disclaims any action upon the merits involved in this controversy and seeks to confine itself to one of jurisdiction. Its decision on the merits, however, *permeates and pervades the entire* opinion so that the final paragraph seems a contradiction and a paradox attached to the end of the opinion.

(2) The opinion of the Circuit Court of Appeals in substance *rewrites a new set of findings of facts* contrary

to and in direct conflict with the District Court's Findings. In particular the version of the facts set forth in the Circuit Court's opinion is in direct conflict with the District Court's version of the facts as stated in its opinion, contrary to Rule 52 of the Civil Rules of Procedure, finding 25, transcript 540 to 547:

> (a) "Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court for judge of the credibility of the witnesses. * * * If an opinion or memorandum of decision is filed, it will be sufficient if the findings of fact and conclusions of law appear therein."

which apparently *constitutes such a departure from the accepted usual* course of *Appellate procedure* as to call for an exercise of this court's supervision. This rewriting is done by eliminating entirely the District Court's finding of fact Nos. 18 and 25, and ignoring Finding 6, Tr. 538.

(1) The district court in its opinion found that the transaction amounted to fraud on the creditors, and fastened a constructive trust upon the respondent Fletcher—*This in no uncertain terms.* Tr. 545-546.

(2) In its too rigid and eager application of section 70(b) of the Act the Circuit Court of Appeals uproots and changes the findings of fact of the District Court in regard to a very vital matter, *i. e.*, the TERMS AND THE TERMINATION OF THE UNDERLYING LEASES. The opinion contains a serious error of fact contrary to documentary evidence and contrary to the findings of the court. It states that these underlying leaseholds expired prior to the filing of the turnover petition. Tr. 618. The most important leasehold was for 14 year term from 1940 to 1954 Tr. 455 (involving filling station No. 6 in lease option) while the bankrupt's hauling contract or franchise with the Ohio Oil Company was of the kind which automatically renewed

itself from year to year, Tr. 463, as was the customary kind used in the wholesale petroleum industry. Tr. 180.

(3) Another rewriting of facts found by the Circuit Court of Appeals contrary to those found by the District Court consists of the Appellate Court setting aside the findings of the District Court on *the question of payment of rent by the Respondent to the Trustee* up to the end of 1946. This the District Court found as a proven fact (finding 25, page 542 transcript top of page 544). That the opinion realizes that it is in the field of rewriting the District Court's findings of facts is indicated on the bottom of page 616 of the transcript where the court proceeds to make its own finding of fact to the effect that the rent paid by Fletcher, respondent, was for the use of the "equipment only" (opinion transcript 616).

(4) Another instance of rewriting the facts is the statement by the Circuit Court of Appeals, "Thus it is undisputed that the Trustee *refused* to assume either the lease between the bankrupt and the respondent or those between the Northern Indiana and other parties." Tr. 613.

This statement of the Circuit Court of Appeals is not only erroneous, but contrary to the record and runs counter to finding of the District Court on this subject.

The Trustee neither *formally* "assumed or rejected the Fletcher lease", Finding 25, Tr. 543, but in fact actually assumed the Fletcher lease, Finding No. 25, Tr. 544, by his conduct of accepting rents thereunder during its entire term.

(5) A further contrary finding of fact indulged by the Circuit Court of Appeals in its opinion is that the Fletcher lease, Exhibit A, was an *executory contract.* This the District Court found to be otherwise. "The failure of the Trustee to assume or reject the Fletcher lease within the time prescribed by section 70(b) of the bankruptcy act did not bring about a termination of the lease insofar as Fletcher was concerned. It only operated as a rejection

of the *executory* provision of the lease which the Trustee might have invoked if he assumed the lease." This is in harmony with section 70(b) "A trustee shall file within sixty days after adjudication a statement under oath showing which if any of the contracts of the bankrupt are executory IN WHOLE OR IN PART * * *."

(6) Not only does the opinion depart from accepted and used course of judicial appellate procedure by rewriting a new and different set of finding of fact but the opinion *ignores the issues* presented by the pleadings filed prior to and with the final Trustee's petition for a turnover order. It ignores the fact that this litigation originally was instituted by creditors who finally after three years of litigation succeeded in bringing the matter of this fraudulent transfer to the attention of the Judge of the District Court who assumed control of this case and *ordered* the Trustee to file the petition for a turnover order.

Yet, the issue of estoppel was raised by the opinion of the Circuit Court of Appeals to which it devotes almost three closely printed pages of its opinion beginning with page 611 and ending at the bottom of page 613. The court's opinion in reviewing the facts surrounding the reluctance or failure of the Trustee to do his duty and ignoring the *resulting reprimand or order of the court to* change his position and do his duty as Trustee to recover these unscheduled assets and which finally the *Trustee was forced to do by filing* the petition for a turnover constitutes an issue which the Circuit Court of Appeals clashes in its opinion with two principles of law:

(1) An established law in bankruptcy that the Trustee is at all times accountable to the court and that the court has supervisory power and directory power over the Trustee and that the Trustee is subject to his orders as long as the bankrupt estate is in *fieri.* (*Green* v. *Finnegan Realty Co.,* 70 Fed. 2nd 693; Remington on Bankruptcy, Vol. 3, 4th Ed. Page 95, Sec. 1209.02).

This well known principle of law which the Circuit Court of Appeals ignored was the fact that the original petitions herein were filed by creditors seeking to force the Trustee to do his duty, which finally culminated in the court *ordering him to do his duty.*

This theory of estoppel on the part of the Trustee indulged in by the Circuit Court of Appeals in view of the fact, that they invoked section 70(b) of the act above set forth *to divest the bankrupt estate* and the Trustee from any right, title or interest in and to the Fletcher lease, *raises an issue under* the circumstances in this case whether the proviso contained in Section 70(b) of the Bankruptcy Act, 11 U. S. C. A. 110b "provided, however, that the court may for cause shown extend or reduce such period of time" *means what it says,* or whether an inactive reluctant or noncooperating Trustee may by his inaction and subject only to the nominal bond required of the average Trustee, which is ordinarily set by the schedules, may, over *the protests of the Judge of the District Court while a bankrupt estate is in fieri,* abandon and dissipate the assets of a valuable estate by merely sitting by and doing nothing and allowing a friend or agent and tenant of the controlling officer of a bankrupt croporation to walk away with all of the assets of an estate and "thumb his nose at the creditors."

That the District Court had ample evidence before it to sustain its findings of facts should be apparent *even without consulting the record* for it is rare that a District Court would support claims of objecting creditors after three years of litigation against the Trustee where the Trustee is the "arm" and officer of the court and, having served many years in that capacity. To be sure, the evidence must have been and *was* impelling to warrant the court to peremptorily order the Trustee to file the instant turnover petition.

SUMMARY OF ARGUMENT.

Argument is confined to reason relied on for allowance of writ.

CONCLUSION.

For the foregoing reasons this petition for a writ of Certiorari should be granted.

Respectfully submitted,

GEORGE COHAN,
Counsel for Petitioner.

APPENDIX.

I.

Bankruptcy Act, 70, 11 U. S. C. A. 110:

b. Within sixty days after the adjudication, the Trustee shall assume or reject any executory contract, including unexpired leases of real property: Provided, however, That the court may for cause shown extend or reduce such period of time. Any such contract or lease not assumed or rejected within such time, whether or not a trustee has been appointed or has qualified shall be deemed to be rejected. A trustee shall file, within sixty days after adjudication, a statement under oath showing which, if any, of the contracts of the bankrupt are executory in whole or in part, including unexpired leases of real property, and which, if any, have been rejected by the trustee: Provided, however, That the court may for cause shown extend or reduce such period of time. Unless a lease of real property shall expressly otherwise provide, a rejection of such lease or of any covenant therein by the trustee of the lessor shall not deprive the lessee of his estate. A general covenant or condition in a lease that it shall not be assigned shall not be construed to prevent the trustee from assuming the same at his election and subsequently assigning the same; but an express covenant that an assignment by operation of law or the bankruptcy of a specified party thereto or of either party shall terminate the lease or give the other party an election to terminate the same shall be enforceable. A trustee who elects to assume a contract or lease of the bankrupt and who subsequently, with the approval of the court and upon such terms and conditions as the court may fix after hearing upon notice to the other party to the contract or lease, assigns such contract or lease to a third person, shall not be liable for breaches occurring after such assignment.

BULK SALES LAW OF INDIANA.

II.

Sec. 33-201 Burns Indiana Statutes Annotated 1933 (8052):

(a) Inventory and notice—The sale, transfer or assignment, in bulk, of any part or the whole of a stock of merchandise, or merchandise and the fixtures pertaining to the conducting of said business, otherwise than in the ordinary course of trade and in the regular prosecution of the business of the seller, transferor, or assignor, shall be void as against the creditors of the seller, transferor, assignor, unless the seller, transferor, assignor and purchaser, transferee and assignee shall, at least five (5) days before the sale, make a full detailed inventory, showing the quantity and, so far as possible with the exercise of reasonable diligence, the cost price to the seller, transferor and assignor of each article to be included in the sale, and unless the purchaser, transferee and assignee demand and receive from the seller, transferor and assignor a written list of names and addresses of the creditors of the seller, transferor and assignor, with the amount of indebtedness due or owing to each, and certified by the seller, transferor and assignor, under oath, to be a full, accurate and complete list of his creditors, and of his indebtedness; and unless the purchaser, transferee and assignee shall at least five (5) days before taking possession of such merchandise, or merchandise and fixtures, or paying therefor, notify personally or by registered mail every creditor whose name and address are stated in said list or of which he has knowledge, of the proposed sale and of the price, terms and conditions thereof. (Acts 1909, Ch. 49 1, p. 122).

IIb.

33-202 (8053) Application of Act—Sellers, transferors and assignors, purchasers, transferees and assignees, under this act, shall include corporations,

associations, copartnerships and individuals, but nothing contained in this act shall apply to sales by executors, administrators, receivers, trustees in bankruptcy or by any public officer under judicial process.

IIc.

33-203 (8054) Liability of purchaser—Any purchaser, transferee or assignee who shall not conform to the provisions of this act, shall upon application of any of the creditors of the seller, transferor or assignor, become a receiver and be held accountable to such creditors for all the goods, wares, merchandise and fixtures that have come into his possession by virtue of such sale, transfer or assignment: Provided, however, That any purchaser, transferee or assignee who shall conform to the provisions of this act shall not in any way be held accountable to any creditor of the seller, transferor or assignor for any of the goods, wares, merchandise or fixtures that have come into the possession of said purchaser, transferee or assignee by virtue of such sale, transfer or assignment. (Acts 1909, ch. 49 3, p. 122).

III.

Bankruptcy Act of 1898, c. 541, 30 Stat. 544:

Sec. 2a of the Act 11 U. S. C. A. 11 (a) (21) F. C. A. Title 11, 11 (a) (21) Require receivers or trustees appointed in proceedings not under this Act, assignees for the benefit of creditors, and agents authorized to take possession of or to liquidate a person's property to deliver the property in their possession or under their control to the receiver or trustee appointed under this Act or, where an arrangement or a plan under this Act has been confirmed and such property has not prior thereto been delivered to a receiver or trustee appointed under this Act, to deliver such property to the debtor or other person entitled to such property according to the provisions of the arrangement or plan, and in all such cases to account to the court for the

disposition by them of the property of such bankrupt or debtor: Provided, however, That such delivery and accounting shall not be required, except in proceedings under chapters 10 and 12 of this Act (Sec. 501 to 676, 801 to 926 of this title), if the receiver or trustee was appointed, the assignment was made, or the agent was authorized more than four months prior to the date of bankruptcy. Upon such accounting, the court shall re-examine and determine the propriety and reasonableness of all disbursements made out of such property by such receiver, trustee, assignee, or agent, either to himself or to others, for services and expenses under such receivership, trusteeship, assignment, or agency, and shall, unless such disbursements have been approved, upon notice to creditors and other parties in interest, by a court of competent jurisdiction prior to the proceeding under this Act, surcharge such receiver, trustee, assignee, or agent the amount of any disbursement determined by the court to have been improper or excessive.

IV.

Sec. 67 d2, 11 U. S. C. A. 107 d2 and d3:

(2) Every *transfer made* and every obligation incurred by a debtor within *one year* prior to the *filing of a petition* in bankruptcy of an original petition under chapter 10, 11, 12, or 13 of this Act (Sec. 501 to 1086 of this title) by or against him is *fraudulent* (a) as to creditors existing at the time of such transfer or obligation, if made or incurred *without fair consideration* by a debtor who *is* or *will be* thereby *rendered insolvent,* without regard to his actual intent; or (b) as to then existing creditors and as to other persons who become creditors during the continuance of a business or transaction, if made or incurred *without fair consideration* by a debtor who is engaged or is about to engage in such business or transaction, for which the property remaining in his hands is an unreasonably small capital, without regard to his actual intent; or (c) as to then existing and future creditors,

if made or incurred without fair consideration by a debtor who intends to incur or believes that he will incur debts beyond his ability to pay as they mature; or (d) as to then existing and future creditors, if made or incurred with actual intent, as distinguished from intent presumed in law, to hinder, delay, or defraud either existing or future creditors.

(3) *Every transfer* made and every obligation incurred by a debtor *within four months* prior to the *filing* of a petition in bankruptcy or of an orignal petition under chapter 10, 11, 12, or 13 of this Act (Sec. 501 to 1086 of this title) by or against him *is fraudulent,* as to then existing and future creditors, if made or incurred with *intent* to use the consideration, obtained for the transfer or obligation, to effect a *preference* to a third person voidable under section 60 of the Act (Sec. 96 of this title). The remedies of the trustee for the avoidance of such transfer or obligation and of such preference shall be cumulative: Provided, however, That the trustee shall be entitled to only one satisfaction with respect thereto. (Our emphasis.)

V.

Clause 8 of subsection A (of Sec. 70 of the Act 11, U. S. C. A. sec. 110 (a) (8) F. C. A. Title 11 Sec. 110(a) (8):

(8) Property held by an assignee for the benefit of creditors appointed under an assignment which constituted an act of bankruptcy, which property shall, for the purposes of this Act, be deemed to be held by the assignee as the agent of the bankrupt and shall be subject to the summary jurisdiction of the court. All property which vests in the bankrupt within six months after bankruptcy by bequest, devise, or inheritance shall vest in the trustee and his successor and successors, if any, upon his or their appointment and qualification, as of the date when it vested in the bankrupt, and shall be free and discharged from any transfer made or suffered by the bankrupt after bankruptcy. All property in which the bankrupt has at

the date of bankruptcy an estate or interest by the entirety and which within six months after bankruptcy becomes transferable in whole or in part solely by the bankrupt shall, to the extent it becomes so transferable, vest in the trustee and his successor and successors, if any, upon his or their appointment and qualification, as of the date of bankruptcy. The title of the trustee shall not be affected by the prior possession of a receiver or other officer of any court.

AUG 9 1950

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1950.

No. 133

In the Matter of
NORTHERN INDIANA OIL CO., INC., a Indiana
Corporation, ALLEGED BANKRUPT.

CHARLES L. SURPRISE, TRUSTEE
IN BANKRUPTCY,

Petitioner,

vs.

ROBERT S. FLETCHER,

Respondent.

On Petition for Writ of Certiorari to the United
States Circuit Court of Appeals for the Seventh Circuit

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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1949.

No. 188

In the Matter of
NORTHERN INDIANA OIL CO., INC., an Indiana Corporation, ALLEGED BANKRUPT,

CHARLES L. SURPRISE, TRUSTEE IN BANKRUPTCY,

Petitioner,

vs.

ROBERT B. FLETCHER,

Respondent.

On Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Seventh Circuit.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

To the Honorable Fred M. Vinson, Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Your respondent respectfully shows:

I.

STATEMENT OF THE CASE.

This is a bankruptcy proceeding initiated on the 26th day of April, 1945, by creditors by the filing of an Involuntary Petition against Northern Indiana Oil Company, Inc., an Indiana corporation, (R. 1) upon which said corporation was duly adjudged to be a bankrupt on May 14, 1945. (R. 4).

On the 28th day of April, 1945, Charles L. Surprise of Hammond, Indiana, was appointed receiver of the bankrupt estate (R. 123, 262) and on June 15, 1945, he was appointed Trustee thereof (R. 5) and duly qualified as such on June 21, 1945. (R. 7).

The principal business of Charles L. Surprise, receiver and trustee of the bankrupt estate, for forty years had been that of acting in the capacity of receiver and trustee in bankruptcy. As such, he had acted in the capacity of State Court receiver and receiver and trustee in bankruptcy in the liquidation of over seven hundred estates. (R. 122-123).

Immediately upon his appointment as receiver he began an investigation looking to the marshalling of the assets of the bankrupt estate, and in so doing, he visited the place of business of the bankrupt and found:

That said business, the operation of which was begun in August, 1937, (R. 393) consisted largely of the retailing and wholesaling of gasoline (R. 126), but it had also engaged in operating an auto parking business on lots leased

for the purpose; the sale of auto accessories and fuel oil (R. 145-147); and the subleasing of a small number of retail gasoline stations (R. 130-146-147);

That five months prior to the adjudication in bankruptcy and on the 12th day of December, 1944, the Office of Price Administration had entered an order prohibiting the bankrupt for so long as gasoline should be rationed from directly or indirectly receiving for resale, selling, transferring or in any other manner dealing in commodities governed by Ration Order Number 5-C, and prohibiting any person, in any manner directly or indirectly, from transferring or delivering said commodities to the corporation for resale during said period, effective on the 6th day after service of such order upon the corporation (R. 341). The effective date was by O. P. A. order later extended to January 15, 1945, (R. 162, 343) and the period during which gasoline was rationed ended on V. J. Day — sometime in August, 1945. (R. 289);

That the business operated by the bankrupt was a losing one from its inception (R. 126, 128) and on January 14 or 15, 1945, that being the effective date of said O. P. A. order, it ceased to do business itself and at the suggestion of J. Ralph Snyder, the President of the bankrupt corporation, (R. 277) who stated to respondent that the corporation was out of business (R. 273, 276-277), respondent went into possession of the property of the corporation (R. 131) mentioned and described in a certain written lease entered into between him and the corporation, effective as of January 15, 1945, and dated January 26, 1945, (R. 131, 271, 297, 282, 413) and thereafter, operated a like business under the name of "R. B. Fletcher." (R. 272, 275, 277). The lease contained an option to purchase the specific personal property in said lease mentioned and described at and for a sum equal to its appraised value. (R. 416).

He further found Respondent Fletcher in possession of all tangible assets and lots leased by the corporation and claiming under the lease with option to purchase from the corporation. (R. 125-132).

He checked an inventory, furnished by Respondent reflecting the assets of the bankrupt, against the actual tangible assets and continued his investigation to determine as to any and all property constituting assets of the bankrupt estate, which investigation continued until a month or two after his appointment as Trustee. (R. 123-130).

Upon the completion of said investigation, he decided that it would be unwise to attempt to take over and operate the business of the bankrupt. (R. 34, 53-60, 131). He did not affirm, adopt or assume any of the leases on the parking lots, filling stations or bulk plant or in any manner take them over, (R. 131, 263-4, 320-321, 322-323, 325), but concluded that he could not and should not attempt to operate them. (R. 132).

He never filed any written assumption of any of the leases of the bankrupt, nor did he affirmatively reject any thereof (R. 133) nor did he after the time within which the Trustee was bound under Section 70(b) to adopt or reject executory contracts including unexpired leases of real property, collect any rental from respondent for the use of any of the real estate held under the various leases and subleases to the corporation. (R. 135).

At no time from the date of adjudication, did the Trustee pay rent for any of the properties originally leased to the bankrupt (R. 538, par. 11) nor did he employ respondent to represent him in any conduct of the business of the bankrupt nor was he ever directed by the Court to assume or adopt any leaseholds (R. 264-265); nor was any demand ever made by the Trustee upon respondent for the possession of any of the property described in the Trustee's Peti-

tion for Turnover filed January 29, 1948; (R. 271) nor was possession relinquished by Respondent or ever taken by the Trustee; nor was notice of any kind ever given to the owner of or the lessee of the lands held under the leases to the bankrupt, by the Trustee, that he did adopt or assume any of the leases or subleases of said corporation. (R. 321, 322, 538), nor did he ever petition the Court for leave to assume said subleases and leases (R. 325, 538, par. 12).

At least twice after the appointment of the Trustee, first on the 29th day of April, 1945, and second, a month or two later, Respondent offered to turn over everything now sought to be recovered by the petition for turnover order to the Trustee who declined to accept it. (R. 138, 139, 143-145, 233-234, 317).

Respondent sought to exercise his option to purchase at a Trustee's sale, but by order of the court entered April 8, 1946, (R. 46) the lease with option to purchase *was held by the Court to have been rejected,* and thereby Fletcher's lease and option rights were terminated and the Trustee so understood. (R. 153, 323, 90, Par. VI).

Thereupon, respondent entered into an agreement with the Trustee to pay as rental for the use of the *tangible personal property including trucks, etc., and exclusive of leaseholds,* a rental of $100.00 per month, and thereafter for a period of twenty months ending at the end of 1946, Respondent paid such rental. (R. 133-135, 20, 233-234, 301-303, 306-309, 311-313, 315).

After the lease was held by the Court, rejected, and more than sixty days after the entry of the order of adjudication, Respondent personally negotiated leases with

the then owners and lessees, as the case might be, on all of the real estate formerly held under leases, or sub-leases, by the Bankrupt. (R. 146, 269, 271, 310) except a vacant lot at 515 West 5th Avenue, Gary, Indiana, and claims to hold thereunder to the exclusion of the Trustee (R. 280, 387).

Subsequent to the 16th day of July, 1945, and more than sixty days after the order of adjudication was entered, Respondent was in possession of the following properties, all described in the lease with option to purchase, and he obtained in his own name leases and/or sub-leases, from the respective owners and/or tenants or sub-tenants of the premises described as gas stations Nos. 1, 2, 6, Aut-O-Asis, bulk plant of Globe Refining Company described in the lease with option to purchase (R. 268-269) as well as Auto Parks, 1, 2, 3, 4, and 7, and the property at 390 Delaware Street, Gary, Indiana, also in said lease described (R. 269, 271, 280-282, 538 Par. 8) and thereafter occupied the same under said leases.

There was and is no claim asserted by Respondent to or against the tangible personal property referred to in finding No. 4 (R. 537) of the District Court as "other physical assets and property" mentioned and described in the Trustee's Petition for Authority to Sell Personal Property (R. 133-34,327) nor any dispute between Petitioner and Respondent concerning the same. The only properties, therefore, involved in the turn-over order which are in dispute are the leases which Northern Indiana had with the owners of such properties (finding 2), which were sublet to Respondent in his lease with Northern Indiana dated January 26, 1945.

The Trustee has consistently declined to take over the leaseholds and has continuously resisted efforts to require him to do so (R. 15-26, 31-35, 48-61, 359, 362, 372, 380, 386, 420-31).

On December 8, 1945, he specifically declined to attempt to establish title or any right or interest in the real estate formerly held under leases by Northern Indiana Oil Company (R. 34, Par. 2).

On November 21, 1945, A. B. Harris, as a stockholder, and Cecilia H. Harris, his wife, as a creditor, and three other creditors, filed their joint petition to bring in unscheduled assets (R. 15-26) which the Trustee resisted by verified answer (R. 31-35).

Thereafter, Harris and Harris requested the Trustee in writing to demand turn-over of all personal property, including leaseholds formerly held by the bankrupt, and which it was alleged Fletcher took over as property of the bankrupt (R. 49) which request was not acted upon by the Trustee. (R. 34).

This was followed by a petition by A. B. Harris filed September 21, 1946, for an order on the Trustee to seize all the personal property and leaseholds belonging to the bankrupt estate and for an accounting (R. 50, 380) from Respondent, which petition was resisted by the Trustee (R. 114-252).

On October 10, 1945, the Trustee filed a petition for authority and direction to sell personal property (R. 418) to which A. B. Harris filed written objections (R. 359) and additional objections (R. 362) to which additional objections, the Trustee filed his reply (R. 372), and Robert B. Fletcher, though not a party, filed his objections to the jurisdiction of the Court (R. 387). On January 21, 1948, Mr. Fred F. Eichhorn, attorney for Robert B. Fletcher, advised Judge Swygert, by letter of that date, that he understood a hearing was to be had on January 22, 1948, on the issues:

1. Whether or not the Trustee should be authorized to sell assets under his petition for authority to do so, and

2. Whether the Trustee should be required to undertake to reduce to possession certain assets.

That as Fletcher had not intervened, nor had he been brought in under an order to show cause why he should not surrender or otherwise, he was of the opinion that Mr. Fletcher would not be affected by a determination of the issues and hence neither Mr. Fletcher nor he would be there (R. 115). The record is silent as to any notice to respondent of said hearing except as shown by said letter.

On January 22, 1948, a hearing was had on the issues raised by the Trustee's petition for authority to sell personal property and the objections and additional objections of Harris and Harris thereto, and the Trustee's reply to said objections; the petition of Harris for an order on the Trustee to seize personal property and for an accounting; and the objections of Respondent to the jurisdiction of the Court "if there was any evidence and if it was not totally a question of law" (R. 119-120) at which hearing, neither Respondent nor his attorney, Mr. Eichhorn, was present (R. 120). The entire evidence adduced on the hearing had on January 22, 1948, on the foregoing issues was received in evidence and considered by the Court in arriving at its determination of the issues raised by the petition for turn-over and Respondent's answer thereto (R. 255, 257-259) over the objection of Respondent (R. 112-114, 257-259).

Of the property sought by the Trustee to be taken over, Respondent was not in possession of the following thereof, either at the time the petition for turn-over was filed on January 29, 1948, or at the time of the hearing thereon on November 5, 1948, to-wit:

Vacant Lot at 515 West 5th Avenue, Gary, Indiana (R. 268, 282).

Gas Station No. 1, 11th and Broadway, Gary, Indiana (R. 283).

Gas Station No. 2, 5th and Mount Street, Gary, Indiana (R. 268, 278).

Gas Station No. 3, 8th Avenue and Washington Street, Gary, Indiana (R. 268, 279, 284).

Gas Station No. 6, 5th and Madison Street, Gary, Indiana, (R. 284-5, 167, 268).

Aut-O-Asis, 3300 West 5th Avenue, Gary, Indiana (R. 279); there is no evidence as to Respondent having in his possession any of the monies sought to be turned over; and of that property sought to be taken over by the Trustee the Respondent had purchased and paid the corporation therefor prior to bankruptcy, certain oils and greases (R. 299); one typewriter (R. 299-300); and he had purchased and paid for the bulk plant of Globe Oil and Refining Company at 390 Delaware Street (R. 270, 285).

In the course of the hearing begun on January 22, 1948, on the issues raised by the Trustee's Petition for Authority to Sell Personal Property, and the Objections and Additional Objections of Harris and Harris thereto, and the Trustee's Reply to said Objections; the Petition of Harris for an order on the Trustee to seize personal property and for an accounting, etc., in the course of colloquy of the Court and counsel, wherein the Court interrogated Mr. Call, then and now the attorney for the Trustee, excepting in the proceedings for turn-over wherein the Trustee was represented by Mr. George Cohan, Esquire, Mr. Call stated that he and the Trustee were of the opinion that Respondent had the right to have his claim to the leaseholds determined in a plenary suit; that they had joined with Mr. Cohan in asking Referee Smith to let him represent Mr. Surprise in the recovery of any assets that he could re-

cover; that he and the Trustee had exercised what they thought was their best judgment and discretion, wholly impartially; that they had no interest in the quarrel between Mr. Harris and Mr. Snyder and that in their opinion the bankrupt had no interest in the business then being operated by Fletcher and that the Trustee had never been in a financial position to take over any leaseholds or business. (R. 246-249).

Thereupon, Mr. George Cohan, the attorney for three small creditors, and Harris and Harris, was employed to bring about the turn-over of property claimed to be a part of the assets of the bankrupt estate.

Thereupon, and two years eight and one-half months after the entry of the order of adjudication, and on the 29th day of January, 1948, Charles L. Surprise, as Trustee of the bankrupt estate, filed his petition for an order requiring Respondent Fletcher to turn over to the Trustee the property described in said petition as constituting a part of the assets of the bankrupt estate (R. 88) and such proceedings were thereafter had that the Court did on the 16th day of February, 1949, enter its Findings of Fact, Opinion and Conclusions of Law (R. 537), and on the 4th day of March, 1949, did enter its order directing the turn-over of the property in said order mentioned and described (R. 548).

From the said order of the District Court directing the turn-over of property, an appeal was taken by Respondent to the United States Circuit Court of Appeals for the Seventh Circuit (R. 561) *both on the merits and on the question of the power of the Court to exercise summary jurisdiction.* (R. 605).

On the 6th day of February, 1950, the Circuit Court of Appeals entered its judgment and opinion reversing said

order (R. 604) and remanding said cause to the District Court with directions that the Trustee's Petition be dismissed for want of jurisdiction.

In its opinion the Circuit Court of Appeals stated that the District Court was without summary jurisdiction, and that it was further of the opinion that if the Court had summary jurisdiction, the Trustee was not entitled to prevail, which said opinion and the said judgment were amended by said Court on April 12, 1950, by striking therefrom certain portions thereof (R. 619).

II.

ARGUMENT.

Summary of the Argument.

Point A.

Where property claimed by a Trustee in Bankruptcy as a part of the bankrupt estate, was at the time of the filing of the petition in bankruptcy in the possession of a third party claiming some beneficial interest therein, the Bankruptcy Court has no jurisdiction in summary proceedings.

Taubel-Scott-Kitzmiller Co. v. *Fox,* 264 U. S. 426, 2 A. B. R. (N. S.) 912; 4 Sup. Ct. 396; 68 Law Ed. 770, 774 Col. 1;

In the matter of Retail Stores Delivery Corporation, Bankrupt (D. C. N. Y. 1933), 5 F. Supp. 892, 893; 24 A. B. R. (N. S.) 15.

Point B.

The leasing of personal property is not such a sale, transfer or assignment in bulk of any part or the whole of a stock of merchandise or merchandise and fixtures pertaining to the conducting of a business as requires compliance with bulk sales law of the State of Indiana.

32 Am. Jur. 28, cases cited in Note 8;

35 Corp. Jur., Landlord and Tenant, Sec. 9, page 954, Col. 2;

6 Corp. Jur., Bailments, Sec. 1, page 1084;

6 Corp. Jur., Bailments, Sec. 35, page 1106;

Meier Electric and Machine Co. v. *Dixon,* 81 Ind. App. 400, 143 N. E. 363.

Point C.

One in possession, not claiming under the bankrupt, but adversely to him and in the right of his lessor, and who has exercised his right of entry, which the Trustee, if in possession, could not justly have resisted, is an adverse claimant.

Gerstel v. *Shaw* (C.C.A. 5th), 71 Fed. (2) 371, 374; 25 A. B. R. (N. S.) 224.

Point D.

When a tenant disclaims to hold under his lease he becomes a trespasser and his possession is adverse and is open to the action of his landlord as a possession acquired originally by wrong.

Willison v. *Watkins,* 3 Pet. 43, 7 Law Ed. 596, 599; *Green* v. *Finnigan Realty Co.,* 25 A. B. R. (N.S.) 111, 115, 70 F. (2d) 465.

Point E.

The Collection of rents from a sub-tenant does not amount to actual or constructive possession of the leased premises by a Trustee in bankruptcy.

Matter of McCrory Stores, 69 Fed. (2) 517, 518; Col. 2; 25 A. B. R. (N. S.) 136.

Point F.

Where one, including a Trustee in bankruptcy, without showing any title in himself, or any right of possession except what exists from the consequence of a tenancy, the existence of which has been destroyed by the rejection of the lease before action brought by the trustee to obtain possession, cannot prevail. Further after rejection, the possession of the tenant is adverse as to the Trustee.

Willison v. *Watkins,* 3 Pet. 43; 7 Law Ed. 596, 599.

Point G.

The bankruptcy statute imposes a duty upon the Trustee in bankruptcy to assume or reject unexpired leases of real property within sixty days after adjudication. Any such lease not assumed or rejected within such time, unless the time be extended by the Court, shall be deemed to be rejected.

In re: Northern Indiana Oil Co., Inc., 65 Fed. Supp. 167, 168; Bankruptcy Act, Sec. 70(b); 11 U. S. C. A. Sec. 110 (b).

Point H.

The title to a lease being property *cum onera* does not pass to the Trustee in Bankruptcy by operation of law upon his appointment and qualification, but only upon the affirmative act of adoption which relates back to the date of the filing of the petition in bankruptcy.

Palmer v. *Palmer* (C.C.A. Conn. 1939) 104 Fed. (2) 161, 163; 40 A. B. R. (N. S.) 286; Cert. Den. 308 U. S. 590; 84 Law Ed. 494; 60 Supreme Court 120, 121;

First National Bank v. *Lasater,* 196 U. S. 115; 13 A. B. R. 698; 49 Law Ed. 408;

Dushane v. *Beall,* 161 U. S. 513; 40 Law Ed. 791;

U. S. Trust Company v. *Wabash Railway Company,* 150 U. S. 289; 37 Law Ed. 1085;

In re: Frazin & Oppenheim (C. C. A. 2nd) 183 Fed. 28; 24 A. B. R. 903;

Watson v. *Merrell* (C. C. A. 8th) 736 Fed. 359; 14 A. B. R. 453;

English v. *Richardson* (N. H. Sup. Ct.) 80 N. H. 364; 48 A. B. R. 582;

Dow v. *Bradley,* 110 Me. 249; 85 A. 896;

Frame v. *Courtenay,* 98 Me. 401; 57 A. 592;

Kirstein Holding Co. v. *Bangor Verities, Inc.*, 131 Me. 421; 163 A. 655;
Matter of Berry (D. C. Mich.) 247 Fed. 700; 41 A. B. R. 357;
Matter of McCrory Stores, (C. C. A. 2nd) 69 Fed. (2) 517, 518; 25 A. B. R. (N. S.) 136, 139;
Matter of Sherwood's Inc., (C. C. A. 2nd) 201 Fed. 754;
In re: *United Cigar Stores* (C. C. A. N. Y.) 69 Fed. (2) 513, 515; 25 A. B. R. (N. S.) 141; Cert. Den. 293 U. S. 556; 79 Law Ed. 665.

Point I.

The immediate sanction of a failure to assume or reject an executory contract is the operation of a conclusive statutory presumption that such failure amounts to a rejection.

Collier on Bankruptcy (14th Ed.) Sec. 70.43, page 1230;
In re: *Northern Indiana Oil Company* (D. C. Ind. 1946); 65 Fed. Supp. 167, 168.

Point J.

The real sanction attaching by reason of the failure to adopt a leasehold is to sur-charge or discipline the Trustee or both if it is shown that the Trustee's inactivity resulting in a rejection constituted not a mere error of business judgment but his neglect of his official duties and resulted in damage to creditors.

Collier on Bankruptcy (14th Ed.), Sec. 70.43; page 1230; Section 47.08.

Point K.

The power to reject executory contracts (including leases) is vested in the Trustee, and it is not a legal prerequisite that he obtain authority so to do from the Court.

Bankruptcy Act, Sec. 70(b); 11 U. S. C. A. Sec. 110(b);
4 Collier on Bankruptcy (14th Edition), Sec. 70.43, pages 1232-1233; Remington on Bankruptcy (4th Edition), Sec. 1209.02, page 95.

Point L.

The Trustee in bankruptcy must obtain authority of his Court to assume a lease.

In re: *Northern Indiana Oil Co., Inc.*, 65 F. Supp. 167, 168, Col. 2;
Collier (14th Ed.) 70.43, page 1233;
Green v. *Finnigan Realty Co.*, 70 F. (2) 465, 466, Col. 1.

Point M.

The failure of a Receiver or Trustee in Bankruptcy within a reasonable time (now fixed by Section 70(b) of the Bankruptcy Act at sixty days) to assume the leasehold *results after its exercise* in disconnecting him entirely from the lease. He thereafter neither holds or holds over as a tenant under it, his rights in the demised premises are terminated and he has no right to continue in possession. If not terminated for some other cause than rejection by the Receiver or Trustee, leaseholds remain the bankrupt's and the bankrupt is free to retain possession thereunder or abandon such leasehold if it chooses, but the bankrupt estate and the Trustee thereof have no further interest.

Green v. *Finnigan Realty Co.*, 70 F. (2) 465.

Point N.

After a tenant disclaims to hold under a lease or declines to take under it, as here, where Trustee rejected the lease, the lessor has a right to possession which the tenant (Trustee) is estopped to deny.

Green v. *Finnigan Realty Co.*, 70 Fed. (2) 465, 467 Col. 1; 25 A. B. R. (N. S.) 111, 115;
Willison v. *Watkins*, 3 Pet. 43; 7 Law Ed. 596.

Point O.

Findings of fact will be set aside if clearly erroneous.
Rule 52 (a) Rules of Civil Procedure, 28 U. S. C. A. Foll. Sec. 723(c) page 677.

Point P.

Findings of fact are not binding on the Appellate Court, even though supported by some substantial evidence if they are clearly against the weight of the evidence, or were induced by an erroneous view of the law.

Home Life Insurance Co. v. *Madere*, 101 F. (2d) 292, 294;
Aetna Life Insurance Co. v. *Kepler*, 116 F. (2d) 1, 4;
United States v. *Armature Rewinding Co.*, 124 Fed. (2) 589, 590.

Point Q.

An express covenant that an assignment by operation of law or the bankruptcy of a specified party thereto, or of either party, shall terminate the lease or give the other party an election to terminate the same, shall be enforcible.

Bankruptcy Act 70 (b), 11 U. S. C. A. 110 (b).

Point R.

The fact that a District Court in Bankruptcy orders its Trustee to file a petition for turn-over of leaseholds after the expiration of the period for the adoption or rejection thereof by the Trustee, does not serve to renew the rights of the Trustee of the Bankrupt estate in and to said leaseholds by reason of the specific provisions of Section 70(b) of the Bankruptcy Act, 11 U. S. C. A. Sec. 110 (b) and does not serve to give unto the Court power to exercise summary jurisdiction.

Greene v. *Finnigan*, 70 Fed. (2) 465; 25 A. B. R. (N.S.) 111, 115;

Pfister v. *Northern Illinois Finance Corp.*, 53 S. Ct. 143; 317 U. S. 144; 87 Law Ed. 146.

Point S.

The Supreme Court will not take on certiorari cases fully heard and adjudicated below for the mere purpose of examining the result.

Deputy v. *DuPont*, 308 U. S. 488; 60 S. Ct. 363 (dissenting opinion of Mr. Justice Roberts);

Magnum Import Co. v. *Houbigant, Inc.*, 262 U. S. 159, 43 S. Ct. 531.

ARGUMENT.

POINT A.

Where property claimed by the Trustee in Bankruptcy as an asset of the Bankrupt Estate, was at the time of the filing of the Petition in Bankruptcy in possession of third parties claiming some beneficial interest therein, the Bankruptcy Court has no jurisdiction in summary proceedings.

The turn-over order shows upon its face that Respondent was in possession of the properties, including leaseholds, all mentioned and described in the lease with option to purchase, on January 16, 1945, and continuously since said date, and the record shows that the petition in bankruptcy was filed on April 26, 1945, or three months and ten days after Respondent's possession began. The evidence and findings establish the foregoing facts.

Hence, unless at some time after January 16, 1945, and January 29, 1948, on which latter date the petition for turn-over was filed, the Bankruptcy Court came into actual or constructive possession of the property, or Respondent held possession on the date the petition for turn-over was filed, without claiming the same in his own right, or Respondent's claim was colorable only, the Bankruptcy Court had no summary jurisdiction to determine the rights of Respondent and his lessors.

If any possession was had by the Trustee, *all* right thereto was lost prior to the filing of the petition for turn-over.

In *Taubel-Scott-Kitzmiller Co.* v. *Fox,* 4 Sup. Ct. 396, 68 Law Ed. 770, the Supreme Court, speaking through Mr. Justice Brandeis said:

> "By the Act of 1898, as originally enacted, the power of the Bankruptcy Court to adjudicate, without consent, controversies concerning the title, arising under either Section 67-e, or Section 60-b, or Section 70-e, was confined to property of which it had possession. The possession, which was thus essential to jurisdiction, need not be actual. Constructive possession is sufficient. It exists where the property was in the physical possession of the debtor at the time of the filing of the petition in bankruptcy, but was not delivered by him to the Trustee, where the property was delivered to the trustee, but was thereafter wrongfully withdrawn from his custody; where the property is in the hands of the bankrupt's agent or bailee; where the property is held by some other person, who makes no claim to it; and where the property is held by one who makes a claim, but the claim is colorable only * * *"

Upon his appointment as Receiver, Mr. Surprise visited the place of business of the bankrupt and found Respondent in possession of its various assets and leaseholds, claiming under a lease with the bankrupt containing an option to purchase, *not the business,* but *the* property demised and mentioned and described in the lease. Neither then, nor upon his appointment as Trustee, did Mr. Surprise disturb the possession of Respondent, nor did he at any time, pay any rental to the bankrupt's lessors; notify them or any of them that he intended to or would assume or reject any leases; make the said lessors parties to the turn-over proceedings; nor employ the Respondent in any capacity, nor did he ever affirmatively reject or assume or obtain the authority of the Court to assume or reject any executory contracts, including leases. No priv-

ity of contract or estate ever came into being as between the Trustee and said lessors. While the Trustee did accept rentals from Respondent under his lease until its rejection as decreed by the Court as hereafter shown, the collection of rents from his subtenant does not amount to actual or constructive possession of the leased premises by a Trustee in bankruptcy.

Respondent raised the jurisdictional question at the threshhold by filing his verified motion to dismiss the petition for turn-over, wherein he set forth matters which, if true, showed him to hold under an adverse title. This motion was overruled.

Later, and without waiving the jurisdictional question, he filed his verified answer to said petition, to which the Trustee filed no replication. In support of said answer and on the issues raised by the petition and answer, Respondent adduced testimony and documentary evidence in hearings had thereon.

POINT B.

The leasing of personal property is not such a sale, transfer or assignment in bulk of any part or the whole of a stock of merchandise or merchandise and fixtures pertaining to the conducting of a business as requires compliance with the Bulk Sales Law of the State of Indiana.

In considering the assertion of petitioner that the leasing of the property by Northern Indiana Oil Company to Respondent was in violation of the Bulk Sales Law of Indiana, it should be borne in mind that the Respondent has never claimed and does not now claim any right, title, or interest in, or the right of possession of, as against the trustee, the personal property (referred to in Finding

Number 4 as "other physical assets and property" R. 537). The only properties, therefore, involved in the turnover order which are in dispute are the leases which Northern Indiana had with the owners of such properties (Finding Number 2 R. 537) which were sublet to Respondent in his lease with Northern Indiana Oil Company, Inc., dated January 26, 1945. (R. 91-98, 608 last paragraph).

In *Meier Electric & Machine Co.* v. *Dixon*, 81 Ind. App. 400, 143 N. E. 363, Pg. 364, Col. 2, the Court said:

> "The thing which this statute inhibits is the sale, transfer, or assignment, in bulk, of merchandise in stock, or of merchandise in stock and fixtures, unless the requirements of the statute are observed. The expression 'stock of merchandise' as used in the statute clearly connotes 'articles of merchandise kept for sale,' otherwise the provision in regard to the sale of such articles 'in the regular course of business' is meaningless, and has no proper place in said statute. This leads to the inquiry, Are the tables, chairs, dishes, table cutlery, stoves, etc., mentioned in the complaint herein, articles kept by the proprietor of a hotel for 'sale in the ordinary course of trade and in the regular prosecution of his business?' The appellant in this case cannot so insist, since it has alleged in its complaint that said articles were used in the business of said appellee Dixon in operating said hotel and sanitarium. Said articles were in no proper sense 'merchandise.' *Kent* v. *Insurance Co.*, 26 Ind. 294, 89 Am. Dec. 463. The court did not err in sustaining the demurrer of appellee Jones."

Further, while in some cases the parties to a letting of personal property are spoken of as landlord and tenant, such transaction is, strictly speaking, a bailment. 35 C. J. 954, Col. 2, *Standard Oil Co.* v. *Dolgin*, 95 Vt. 414, 115 A 235. A bailment is a delivery of property for some par-

ticular purpose (such as possession and use thereof for the term of the contract), or a mere deposit, upon a contract, express or implied, that after the purpose has been fulfilled it shall be redelivered to the person who delivered it, or otherwise dealt with according to his directions, or kept until he reclaims it, as the case may be. 6 C. J. Bailments Sec. 1, Pg. 1084. After the creation of a bailment the bailor retains the general title to, or property in, the subject matter of the bailment, * * *. The bailor may accordingly *assert his title* not only as against the bailee but also as against creditors of the bailee * * * and attempted transfer of the property or any interest therein, by the bailee. 6 C. J. Bailments Sec. 35, Pg. 1106.

The authorities agree that, in order that the relation of landlord and tenant may exist, there must be present the element of permission or consent on the part of the landlord, *and of subordination to the landlord's title and rights* on the part of the tenant. 35 C. J. Landlords and Tenants, Sec. 2, Pg. 951, Col. 1.

It surely requires no citation of authority to establish that any equity in personal property, the title to which is vested in a bailor, may be subjected to the payment of claims of creditors.

Assuming, but not admitting, that the leasing was in violation of the bulk sales law, it could not affect the situation here. The petitioner had every right and opportunity to step into the shoes of the bankrupt by assuming the leaseholds. The choice was his and respondent would have been bound, had his choice been to take over the leaseholds, to surrender them to him. The trustee's choice was otherwise and in making it, he was in no way hampered or persuaded by anyone.

POINT C.

One in possession, not claiming under the Bankrupt, but adversely to him and in the right of his lessor, and who has exercised his right of entry, which the Trustee, if in possession, could not justly have resisted, is an adverse claimant.

In *Gerstel* v. *Shaw,* (C. C. A. 5th), 71 Fed. (2) 371, wherein it was contended by the Trustee, that since the bankrupt was in possession when the petition in bankruptcy was filed, the property was in custodia legis, when the petition was filed, the Court could exercise jurisdiction, the Fifth Circuit said:

> "Pendency of a petition does not hinder a pledgee from asserting his rights against pledged property. We have no doubt that a landlord may similarly enforce his right of entry against defaulting tenants, (citing *Elk Brook Coal Co.* (D. C. Pa.) 261 Fed. 445, 34 A. B. R. 283.) The mere surrender by the alleged bankrupt of a leasehold estate pending his adjudication may amount to nothing in the Court's option; but here, assuming the validity of the contested lease, the tenant was in default * * *.
>
> Giving Shaw no better position that her grantor would have, she was entitled to enter under Florida law because of default. The surrender to her was but a recognition of her right * * *. If there was in fact no lease, as Miss Shaw then understood and now contends, the alleged bankrupt had no interest in the hotel. Its possession was for the owner, and the Trustee had no right to possess it. It is plain that Miss Shaw does not claim under the bankrupt but adversely to him and in the right of her grantor, and has exercised a right of entry, which the Trustee, if in possession, could not justly have resisted without at least paying up the defaults. He in fact has, as the bankrupt then had, no means to do so."

Applying the foregoing reasoning to the case at bar:

Respondent, on January 16, 1945, and three months and ten days prior to the filing of the petition in bankruptcy on April 26, 1945, took possession of the physical properties and leaseholds sought to be turned over under a lease for a term of one year giving him an option to purchase. He continued to occupy thereunder until April 8, 1946, when the lease was held rejected by decree of the District Court. The order of adjudication in bankruptcy was entered May 14, 1945. The sixty-day period within which the Trustee was required to adopt or reject leases expired July 16, 1945. The Trustee failed to either assume or reject the leases and hence they were deemed rejected, and on July 17, 1945, the lessors were entitled to possession of the properties as against the bankrupt estate and the trustee thereof.

A Landlord-tenant relationship, as between the Trustee of the bankrupt estate and the lessors, never came into being by reason of the fact that title to leaseholds and the right to possession thereunder does not pass to the Trustee in bankruptcy by operation of law, but only upon adoption of the leaseholds by the Trustee.

Respondent, subsequent to the 16th day of July, 1945, and before the petition for turnover was filed, obtained leases from the respective lessors in his own right and thereafter held and still holds possession under such leases. His possession was and is for the lessors and the Trustee never had, nor does he now have, any right to possess the leased properties except such right as was given to him by statute within which to assume or reject leases.

Here the Trustee never became the tenant of the various lessors under the leases running to the bankrupt, because

title to the leaseholds does not pass by operation of law, but only upon adoption by the Trustee, and the Trustee having failed to assume or reject within the time fixed by statute, leases are deemed to be rejected.

POINT D.

When a tenant disclaims to hold under his lease he becomes a trespasser and his possession is adverse and is open to the action of his landlord as a possession acquired originally by wrong.

Assuming for the sake of argument that the Trustee did become a tenant under said leases, having rejected them, he becomes a trespasser and his possession is adverse and is open to action by his landlord as a possession acquired originally by wrong.

In *Green* v. *Finnigan Realty Co.*, 70 Fed. (2) 465, 25 A.B.R. (N.S.) 111, the Second Circuit stated:

> "But the right of a receiver or trustee in bankruptcy within a reasonable time to reject the leasehold, results after its exercise in disconnecting him entirely from the lease. He thereafter neither holds nor holds over as a tenant under it."

In *Willison* v. *Watkins*, 3 Pet. 43, 7 Law Ed. 596, while recognizing the principle that one is estopped to deny the title of another from whom he obtained possession without surrendering possession, it was held:

> "When a tenant disclaims to hold under his lease he becomes a trespasser, and his possession is adverse and is open to the action of his landlord as a possession acquired originally by wrong. The act is conclusive on the tenant. *He cannot revoke his disclaimer and adverse claim so as to protect himself during the unexpired term of the lease; the relationship of the*

landlord and tenant is dissolved and each party is to stand upon his right." (Emphasis ours).

Much more should this be true as to the receiver whose occupation under the lease was but tentative and whose right to disclaim it was perfect. The lessor had, after the disclaimer, a right to possession which the receiver was estopped to deny * * *."

POINT E.

The collection of rents from a subtenant does not amount to actual or constructive possession of the leased premises by a Trustee in Bankruptcy.

Supporting the proposition that title does not pass by operation of law, the Second Circuit, through Judge August N. Hand, in *Matter of McCrory Stores,* 69 Fed. (2) 517, at page 518, quotes from *Matter of United Cigar Stores,* 69 F. (2) 513, with approval that:

> "Any right of the trustee in the leasehold *was not a title thereto but an option to acquire title,* if acquisition should seem to the trustee best for the estate." (Emphasis ours.)

Further the Court said:

> "The collection of the subrents would not amount to actual or constructive possession of the leased premises."

POINT F.

Where one, including a Trustee in Bankruptcy, without showing any title in himself, or any right of possession except what exists from the consequence of a tenancy, the existence of which has been destroyed by the rejection of the lease before action brought by the Trustee to obtain possession, cannot prevail. Further after rejection, the possession of the tenant is adverse to the Trustee.

As shown under Point A of this argument, the possession of Respondent began on January 16, 1945, and has continued to date. From January 16, 1945, until July 16,

1945, the date upon which all of the leases and executory contracts were deemed rejected under Section 70b of the statute, his holding was under his lease with option to purchase, which by decree entered on April 8, 1946, was held to have been rejected. Quite obviously the rejection occurred as of July 16, 1945, that being the last day of the period within which the Trustee could assume or reject leases and executory contracts. Any rental paid by Respondent thereafter and to the date of the decree of rejection of his lease (the record shows none ever paid to the trustee on the leaseholds), could only have been made under a mistake of law. Having obtained new leases in his own right immediately after July 16, 1945, his possession under the new leases became adverse to the Trustee and such claim has been continuously asserted and such possession continued to be and still is adverse.

One in possession as a tenant may set up title in himself and deny the title of the landlord without first surrendering to him the possession. From the time of the rejection of the leases by the Trustee any possession by the Trustee would be adverse to the lessors. In fact he would be a trespasser. The rejection or disclaimer by the Trustee terminated any tenancy or right to tenancy as to him under the underlying leases.

Under these circumstances, the Trustee is claiming without showing any title in himself, or any right of possession except what exists from the consequences from the possibility of a tenancy, the existence of which he denied, by his rejection of the leases which terminated as to him on July 16, 1945.

In *Willison* v. *Watkins,* 3 Pet. 43, 7 Law Ed. 596, wherein a tenant had disclaimed his landlord's title and it was contended that by becoming a tenant, the man and his heirs, so long as they remain in possession are prevented from setting up any title in themselves, or from denying that of the landlord without first surrendering the possession. The Supreme Court said:

> "It is an undoubted principle of law fully recognized by this Court that a tenant cannot dispute the title of his landlord, either by setting up title in himself or a third person *during the existence of the lease or tenancy.* The principle of estoppel applies to the relation between them and operates at its full force to prevent the tenant from violating the contract by which he obtained and holds possession.
>
> But we do not think it has been adopted to the extent contended for in this case which presents a disclaimer by a tenant with the knowledge of his landlord and an unbroken possession afterwards for such length of time that the statute of limitations has run out four times before he has done any act to assert his right to the land.
>
> Here was no secret disclaimer, no undiscovered fraud; it was known to Bordeaux and was notice to him that Willison meant to hold from that time by his own title and on adverse possession. This terminated the tenancy as to him." (Emphasis ours.)

Likewise here, the rejection by the Trustee was known to the Lessors and the parties by reason of the record in the bankruptcy proceeding which is notice to the world, and in this situation, should the lessors have asserted that the Trustee had assumed the respective leases and was bound to pay the rentals thereunder, it is perfectly apparent that the Trustee could defeat any such contention by interposing the rejection which became effective upon his failure to either assume or reject said leases within

a sixty-day period or any extension thereof. Not only is the Trustee here bound by the rejection or disclaimer of the leases but his rejection destroyed the tenancies and destroyed any right to assert estoppel as against the Respondent. In fact, the Trustee, had he been in possession, would have been a trespasser.

POINT G.

The Bankruptcy Statute imposes a duty upon the Trustee in Bankruptcy to assume or reject unexpired leases of real property within sixty days after adjudication. Any such lease not assumed or rejected within such time, unless the time be extended by the Court, shall be deemed to be rejected.

In *Northern Indiana Oil Company, Inc.*, 65 Fed. Supp. 167, Judge Swygert quotes Section 70b of the Statute, 11 U. S. C. A. 110 (b) and says:

> "Applying the finding of the Referee (that the Trustee has neither assumed nor rejected the lease) to the law, the lease with its accompanying option to buy was rejected."

As is well stated in 4 Collier on Bankruptcy (14th Ed.) Section 70.43, page 1230, in speaking of the privileges and duties of a Trustee in bankruptcy to assume or reject executory contracts:

> "It makes it his duty within a prescribed period of time, either to assume or reject without however, having attached any immediate sanction to a failure to elect *except the operation of a conclusive statutory presumption that such failure amounts to a rejection.* The real sanction is an indirect one, namely, surcharge or disciplinary measures, or both, if it is shown that the trustee's inactivity resulting in rejection constituted

not a mere error of business judgment but a neglect of his official duties and resulted in damage to the creditors." (Emphasis ours).

And further in 2 Collier on Bankruptcy (14th Ed.) Section 47.08, page 1745:

> "Trustees, like executors and administrators, are bound to use reasonable diligence in the discharge of their duty to 'collect and reduce to money the property of the estates for which they are trustees' and to secure possession of all the property and collect debts due."

POINT H.

The title to a lease being property cum onere does not pass to the Trustee in Bankruptcy by operation of law upon his appointment and qualification, but only upon the affirmative act of adoption which relates back to the date of the filing of the Petition in Bankruptcy.

Unlike title to property other than executory contracts, as was said by Judge Learned Hand, in *Palmer* v. *Palmer*, 104 Fed. (2) 161, page 163:

> "A lease being property cum onere does not pass to the Trustee in Bankruptcy unless he adopts it. Yet if the question were to arise for the first time, it would be a little hard to see by what power the court could keep a trustee in possession while he was determining his course without compelling him meanwhile to fulfill the conditions imposed upon the term; for instance, the payment of any rent, secured by a right of reentry. While such ad iterim payments need not, and of course would not, constitute an adoption of the term, insolvency ought not to give the lessee's creditors greater rights to possession than the lessee himself enjoyed; and if the Trustee were to hold the premises even temporarily, he should be allowed to do so upon the same terms as the lessee."

Here, there is and never has been, any claim that the leases and executory contracts were assumed. The Trustee has never performed any of the terms, convenants and conditions contained in the leases and contracts on the part of the bankrupt lessee to be performed, and never has offered nor does he now offer to. In fact the evidence and findings establish that he never had any funds with which to do so.

POINT I.

The immediate sanction of a failure to assume or reject an executory contract is the operation of a conclusive statutory presumption that such failure amounts to a rejection.

As stated in 4 Collier on Bankruptcy (14th Ed.) Sec. 70.43 at page 1230:

> "It (Section 70b) makes it the duty of the Trustee within a prescribed period of time either to assume or reject, without however, attaching any immediate sanction to a failure to elect except the operation of a *conclusive statutory presumption* that such failure amounts to a rejection."

POINT J.

The real sanction attaching by reason of the failure to adopt a leasehold is to sur-charge or discipline the Trustee or both if it is shown that the Trustee's inactivity resulting in a rejection constituted not a mere error of business judgment but his neglect of his official duties and resulted in damage to creditors.

The real sanction attaching to the failure of the Trustee to either assume or reject an executory contract is an indirect one, viz: sur-charge or disciplinary measures, or

both, if it is not shown that the Trustee's inactivity resulting in rejection constituted not a mere error of business judgment but a neglect of his official duties and resulted in damage to the creditors.

If, as contended by the Petitioner, his failure to act was either deliberate without giving consideration to the value of the assets rejected or did not exercise good business judgment (the record wholly fails to establish that he was in any way persuaded or induced by anyone to permit said leaseholds to be rejected) the complaining creditors could have taken such steps as might be necessary or proper to procure either an extension of time within which such leaseholds might be adopted or rejected, or could have taken appropriate action to exercise the rights given to the Trustee under 70 (b) to either adopt or reject, or they may now proceed against the Trustee under Section 47a (1) of the Bankruptcy Act, 11 U. S. C. A. 75a (1) and establish the Trustee's liability for negligence.

However, the record abundantly shows and establishes that the Trustee performed his duties, as such, with the highest degree of efficiency and that his determination not to adopt the leaseholds, a large number of which were oral leases running from month to month, and others containing anti-bankruptcy clauses without either having funds in the bankrupt estate with and out of which to pay the rentals required or being able to procure funds by borrowing or otherwise, was assuredly the exercise of excellent business judgment.